Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION,

Petitioners,

v.

FREDERICK D. EDWARDS, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The Oregon Court Of Appeals

PETITION FOR WRITTEN OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a $22.5 million punitive damages award to the treating physician of a patient who was injured by a prescription drug – an amount 45 times greater than the physician's compensatory damages for claims of emotional distress and injury to reputation – unconstitutionally excessive when:

a. it is cumulative to a $35 million punitive damages award to the injured patient, imposed by the same jury, against the same defendant, to punish and deter the same course of conduct; and

b. the jury was permitted to impose each award as punishment for all of the harm actually or potentially caused throughout the United States by petitioner's conduct of a national marketing campaign; and

c. the appellate court relied upon a "rational juror" standard of review to approve the jury's punitive damages award, contrary to the requirements of due process of law as interpreted by this Court in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)?

2. Did Oregon violate petitioner's right to due process of law by imposing substantial punitive damages upon petitioner through a trial procedure that was distorted by a collusive arrangement between the physician and his injured patient and which tainted the jury's ability to evaluate the petitioner's culpability and determine the appropriate punishment?

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all of the parties to the appellate proceeding in the Oregon Court of Appeals, whose judgment is sought to be reviewed:

Petitioners are Key Pharmaceuticals, Schering Corporation, and Schering-Plough Corporation (collectively, "Key"). Key Pharmaceuticals is a wholly owned subsidiary of Schering Corporation. Schering Corporation, in turn, is a wholly owned subsidiary of Schering-Plough Corporation. Schering-Plough Corporation is a publicly traded company and no publicly held company owns 10% or more of Schering-Plough Corporation's stock. Petitioners were appellants in the Oregon Court of Appeals, seeking review of the awards of punitive damages assessed against them as defendants in a suit brought by Paul R. Bocci, Jr., guardian ad litem for Paul R. Bocci, III, and as cross claim defendants in a cross claim brought by co-defendant Frederick D. Edwards, M.D.

Respondent is Frederick D. Edwards, M.D., who was Plaintiff's treating physician and, pursuant to a so-called "Mary Carter" agreement, a nominal defendant in the lawsuit brought by Plaintiff. Respondent also was a cross-claimant against Key. Respondent was an appellee in the Oregon Court of Appeals.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioners Key Pharmaceuticals, Schering-Plough Corporation and Schering Corporation (collectively "Key") respectfully petition for a writ of *certiorari* to review the judgment of the Oregon Court of Appeals in *Bocci v. Key Pharmaceuticals, Inc.*, 178 Or. App. 42, 35 P.3d 1106 (2001) (1a-11a).

OPINIONS BELOW

The Oregon Court of Appeals first affirmed per curiam the trial court judgment by an equally divided court. *Bocci v. Key Pharmaceuticals, Inc.*, 158 Or. App. 521, 974 P.2d 758 (1999) (en banc) (per curiam) (12a-70a) (hereinafter *Bocci I*). On Key's petition for review, the Oregon Supreme Court vacated the Court of Appeals decision and remanded for reconsideration. *Bocci v. Key Pharmaceuticals, Inc.*, 332 Or. 39, 22 P.3d 758 (2001) (71a-72a). On remand, the Court of Appeals again affirmed the trial court judgment. *Bocci v. Key Pharmaceuticals, Inc.*, 178 Or. App. 42, 35 P.3d 1106 (Or. Ct. App. 2001) (1a-11a) (hereinafter *Bocci II*). The Oregon Supreme Court denied Key's second petition for review. *Bocci v. Key Pharmaceuticals, Inc.*, 334 Or. 260, 47 P.3d 486 (Or. 2002) (73a).

JURISDICTION

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1257(a). On June 4, 2002, the Oregon Supreme Court denied discretionary review of the Court of Appeals decision that is the subject of this petition. This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides, in pertinent part: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . . " U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the substantive and procedural limitations imposed by the Fourteenth Amendment to the United States Constitution on punitive damages awards. This case presents two closely related federal questions: 1) whether the $22.5 million punitive damages award to Dr. Frederick D. Edwards against Key is unconstitutionally excessive; and 2) whether the State of Oregon violated Key's right to due process of law through a trial procedure that did not provide the minimal procedural protection to Key required to assess true culpability. The punitive damages award at issue here arose from a cross-claim by Dr. Edwards against Key. Dr. Edwards claimed that Key's long-term, national marketing campaign of its theophylline drug, Theo-Dur, had overstated the safety of the drug, and caused Dr. Edwards to misdiagnose Plaintiff Paul R. Bocci's ("Plaintiff") theophylline toxicity, resulting in Plaintiff's personal injury and Dr. Edwards' emotional distress.

A. Summary of Facts

In October 1990, Dr. Edwards treated Plaintiff for nausea, vomiting and diarrhea. Plaintiff informed Dr. Edwards that he had been taking Theo-Dur, a theophylline product manufactured by Key, without side effects for years. Dr. Edwards did not know that Plaintiff had just completed a cycle of an antibiotic, Ciprofloxacin, which had been prescribed by another doctor for a skin rash. Tr. 1028-29; 1267-68; 1272; 1294-95; 2482-83.[1] Ciprofloxacin and theophylline can interact in ways that cause theophylline toxicity. Tr. 2484; 2486.

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[1] The designation Tr. ___ refers to the trial court transcript.

When Dr. Edwards treated Plaintiff, both the Theo-Dur package insert and the 1990 Physicians Desk Reference (PDR) Supplement A entry on Theo-Dur included a series of warnings about theophylline toxicity, and a warning that theophylline and Ciprofloxacin could interact to cause toxicity. Dr. Edwards did not consult either reference. Trial Exs. 308, 318; Tr. 1389; 1462-65; 3633-34. Although Dr. Edwards knew that an upset stomach, nausea and vomiting were symptoms of theophylline toxicity and considered such toxicity as part of his differential diagnosis, he did not consider it a "realistic possibility," because he had a "general impression" that Theo-Dur was safe. He did not order a blood test to check Plaintiff's theophylline levels. Instead, he treated Plaintiff for the flu and sent him home. Tr. 1270-71; 1347-49.

Once at home, Plaintiff suffered seizures. When emergency room doctors learned that Plaintiff had been taking theophylline, they ordered a blood test that showed Plaintiff's theophylline levels to be in a very high toxic range. Although doctors treated Plaintiff with dialysis to reduce the amount of theophylline in his system, Plaintiff suffered brain damage resulting in short-term memory loss. Tr. 492; 499-500; 505; 513-14.

Before Plaintiff filed this lawsuit, he and Dr. Edwards entered into two agreements: a Covenant Not To Enforce Judgment and a Separate Loan Agreement.[2] In the covenant,

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[2] Such agreements are often referred to as "Mary Carter Agreements" based on a Florida appellate decision involving such a settlement. *See Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Ct. App. 1967); *Ward v. Ochoa*, 284 So. 2d 385, 386 (Fla. 1973) (first case to use the term "Mary Carter Agreement"). Under a Mary Carter Agreement, such as the one entered into between plaintiff and Dr. Edwards, a settling defendant cooperates fully with the Plaintiff throughout the litigation to shift liability to the remaining defendants, all the while continuing to appear to the jury as a co-defendant. Typically, such cooperation includes coordination of discovery, jury selection and witness examination. As happened here, the Mary Carter defendant

(Continued on following page)

Dr. Edwards gave Plaintiff a non-refundable cash payment of $200,000, and in return Plaintiff agreed not to enforce any judgment he obtained against Dr. Edwards. Dr. Edwards separately agreed to lend Plaintiff up to an additional $800,000, in part to finance Plaintiff's litigation against Key. The loan was only to be repaid from money that Plaintiff recovered from Key – the more Plaintiff recovered from Key, the more of the loan proceeds Dr. Edwards would recoup. The loan would be fully repaid if Plaintiff recovered at least $3 million from Key. The agreements also provided that Plaintiff would sue both Key and Dr. Edwards, and that Dr. Edwards would participate as a defendant in the lawsuit. According to the agreements, Dr. Edwards agreed to be sued by Plaintiff "to have a chance to be found innocent without fear of a large jury verdict . . . "; and "[t]o provide . . . an opportunity to cross-claim against Key for the injury, particularly to his reputation. . . . " Trial Ex. 136.

As contemplated by their arrangement, Plaintiff sued Dr. Edwards on the already-settled malpractice claim and sued Key for failing to provide adequate warnings about the dangers of Theo-Dur. Dr. Edwards, in turn, asserted cross-claims against Key for negligence and fraud. Both Plaintiff and Dr. Edwards claimed that Key had engaged in a long-term, national marketing campaign designed to convince prescribing physicians that Theo-Dur is safer than other theophylline products. They claimed that this marketing campaign had lulled Dr. Edwards and other physicians around the country into believing that Theo-Dur was safe. This, they claimed, caused Dr. Edwards' failure to diagnose Plaintiff's theophylline toxicity. Dr. Edwards and his wife testified that he had suffered emotional distress as a result of Plaintiff's injury and this lawsuit, although he did not seek medical treatment. Dr. Edwards also testified that he believed his professional

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often is dismissed from the case prior to the rendering of a verdict. *See Bocci I,* 50a (Landau, J., dissenting).

reputation had been affected. There was no other evidence of injury to Dr. Edwards' person, property or reputation. Third Am. Compl. at 4-10; Tr. 2548; 2554-56; 2913; 3650-51.

Even though Plaintiff's claims against him were settled and Dr. Edwards stood to gain financially if Plaintiff recovered from Key, at trial Dr. Edwards participated in jury voir dire, opening statements and examination of witnesses, ostensibly as Key's co-defendant. For example, Plaintiff called Dr. Edwards as a "hostile" witness, and conducted the examination by leading questions generally permitted only when questioning adverse parties. Although their interests were completely aligned, Plaintiff and Dr. Edwards were allowed to cross-examine each other's witnesses. And although Plaintiff had sued Dr. Edwards, Plaintiff produced no evidence of Dr. Edwards' medical malpractice. In fact, when Plaintiff called an emergency room physician to testify as an expert, no questions were asked about the quality of Dr. Edwards' care and Plaintiff successfully objected when Key attempted to demonstrate, on cross-examination, that the expert's notes referred to this case as a "classic presentation" of theophylline toxicity that Dr. Edwards should have recognized. Tr. 1898-1900; Trial Ex. 147. Although Dr. Edwards' expressed reason for becoming a defendant was to prove his innocence, Plaintiff dismissed him from the case at the close of the evidence and before the case went to the jury. The court instructed the jury that "you are not to concern yourself with any reasons why *the court* has withdrawn those allegations." Tr. 4283 (emphasis added).

Throughout the trial, Key was prohibited from exposing Dr. Edwards' bias or the true nature of his interest in the litigation. The trial court refused to admit the agreements as evidence because they were a settlement agreement. Tr. 3834. The court also prevented Key from cross-examining Dr. Edwards about the agreements, even after Dr. Edwards testified about how distressed he had been to be served with Plaintiff's anticipated complaint. Tr. 1386. The court also limited Key's comments about the agreements in opening and closing statements. Instead, the

trial court gave jury instructions which described the agreements in very general terms.[3] Tr. 3855-56.

Both Plaintiff and Dr. Edwards sought to punish Key for its nationwide marketing activities. The evidence at trial focused on what Dr. Edwards described as Key's "aggressive marketing of its product as safe through Dear Doctor letters, Dear Pharmacist letters, journal advertisements, patient cards, and detailers all over the country." They claimed that Key's national advertising "emphasized only themes of safety and protection against toxic side effects." And they presented evidence that the Food and Drug Administration had objected to Key's claims in national marketing materials that Theo-Dur was superior to generic theophylline products. Cross-Resp't Br. at 14, 83; Trial Exs. 3, 80.

Neither Plaintiff nor Dr. Edwards presented evidence of any other injury caused by Key's marketing of Theo-Dur. Nor did they present evidence of the extent to which Theo-Dur was prescribed, used or marketed in Oregon. They did, however, present evidence that in 1993 Key earned $90 million in revenue from Theo-Dur sales nationwide, $4.3 billion in total income and $1.1 billion in profit. Tr. 2162, 2164, 2169. At the close of all the evidence, both Plaintiff and Dr. Edwards were allowed to increase their prayers for punitive damages to $35 million each, to conform to evidence that Key had sought through its aggressive promotions to avoid a projected potential loss of

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[3] The first instruction was given prior to trial to a courtroom full of prospective jurors, and told them that there was a "settlement agreement," that Dr. Edwards remained "a party to this lawsuit" and that there was a "schedule for repayment . . . to Dr. Edwards." Tr. 187-88. The instruction said that jurors could consider the "settlement only as it might bear on the issue of credibility or believability of the witnesses. . . . " Tr. 188. The court also gave an instruction at the end of the case that told the jury that "Dr. Edwards . . . paid a certain amount of money to plaintiff . . . " and that "[a]ll or none or a portion of the money . . . will be repaid, depending upon the amount of any recovery . . . from non-agreeing defendants." Tr. 4305-06.

$35 million in 1988 due to nationwide generic substitutions for Theo-Dur prescriptions. Tr. 3885-88; Trial Exs. 66, 70, 28.

The trial court instructed the jury that the punitive damages awarded could not exceed $35 million. Tr. 4308. The court then submitted the case to the jury with separate verdict forms for the claims of Plaintiff and Dr. Edwards. Tr. 4841. Each form instructed the jury that the punitive damages could not exceed $35 million, and provided a blank space for the amount of the jury's award. The jury returned verdicts against Key and awarded Plaintiff $5.6 million in compensatory damages[4] and $35 million in punitive damages. The jury awarded Dr. Edwards $500,000 in compensatory damages and imposed on Key a separate punitive damages award of $22.5 million for the same conduct upon which the punitive damages award to Plaintiff was based. 129a-130a. Consistent with Oregon statute,[5] the judgment made the State of Oregon a judgment creditor for 50 percent of the punitive damages awards.

B. Presentation of Federal Questions

Both at trial and on appeal, Key argued that this fundamentally unfair trial procedure resulted in awards of punitive damages that violated federal due process. *See* Appellant's Opening Br. ("AOB") 97a-100a (citing trial court record). From the outset, Key argued that the collusive agreements between Plaintiff and Dr. Edwards and the way that they were mishandled at trial deprived

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[4] The jury found Plaintiff 35 percent at fault and reduced his compensatory damages award by that percentage. 122a-124a.

[5] At the time of the judgment, OR. REV. STAT. § 18.540 (1993) provided that the State would receive 50 percent of any punitive damage award. 74a. The statute was subsequently amended to increase the State's share to 60 percent. OR. REV. STAT. § 18.540(1)(b) (2001).

Key of its right to due process of law.[6] Key also argued that the trial court's review of the punitive damages awards was insufficient, in part, because it was based upon facts assumed to have been found by the jury after a fundamentally unfair trial.[7]

Key also consistently claimed that the punitive damages awarded to Dr. Edwards were unconstitutionally excessive. The Oregon courts consistently have rejected that claim. In a post-trial motion, Key argued that the punitive damages awards to Plaintiff and Dr. Edwards, both alone and in combination, violated the Due Process Clause:

> A windfall of $35 million and $22.5 million, respectively to two parties whose own errors gave rise to their injuries simply cannot be justified under the Fourteenth Amendment.

Defs.' Mot. for J. Notwithstanding the Verdicts or, in the Alternative, for a New Trial or Remittitur, 81a-82a.

In its reply brief, Key told the trial court that the punitive damages awarded to Dr. Edwards were particularly indefensible because they were disproportionate to the harm suffered by Dr. Edwards:

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[6] *See, e.g.,* Defendant Key Pharmaceuticals' Motion to Dismiss, or in the Alternative, to Have the Mary Carter Agreement Declared Void, 77a ("Mary Carter agreements create a trial environment which is so unfair to the nonsettling defendants as to deprive them of their constitutional right to a fair trial. The Due Process clause of the Fourteenth Amendment guarantees litigants a fair trial.").

[7] Key argued:

> In effect, the court's perception was infected by the same virus that affected the jury's verdict: the mischaracterization of the law and the facts, created by the collusive efforts of Plaintiff and Edwards, and intended to place full responsibility for Plaintiff's injuries on Key.

AOB, 97a. Key also argued that the nature of the deprivation involved in the assessment of punitive damages transformed the unfair trial into a denial of due process. *Id.*

> [A]lthough the injuries sustained by Plaintiff certainly qualify as "serious harm," the harm complained of by Dr. Edwards (as distinct from his patient) was mild in comparison. Furthermore, the harm was unsupported by the evidence and was too remote and speculative to support the kind of punitive damage award he obtained. . . . The $22.5 million the jury awarded Dr. Edwards is not only incredible on these facts, it is preposterous!

Defs.' Reply Mem. in Support of Mot. for J. Notwithstanding the Verdict, 88a.

The trial court, in a review conducted soon after this Court's decision in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994), refused to reduce the punitive damages awards.

On appeal, Key argued both that the punitive damages award to Dr. Edwards was unconstitutionally excessive and that the awards were tainted by unfair trial procedures. AOB, 97a-100a. After oral argument before the Oregon Court of Appeals, Key settled with Plaintiff and the court dismissed Plaintiff from the case. *Bocci I*, 14a n.2 (Riggs, J. concurring). As to Dr. Edwards, the Court of Appeals, sitting en banc, affirmed per curiam the trial court judgment by an equally divided court.[8] A concurring opinion joined by four of the eight participating judges rejected all of Key's arguments about the fundamental unfairness of the trial procedure and its impact on the punitive damages award. The concurrence also rejected Key's argument that the punitive damages were unconstitutionally excessive. Inexplicably, the opinion made no reference to this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 599 (1996), which was discussed

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[8] The dissent would have reversed the trial court judgment on the ground that the trial was fundamentally unfair. *Bocci I*, 47a-70a (Landau, J., dissenting).

at length in Key's reply brief.[9] Thus, the appellate court failed to review the punitive damages awarded to Dr. Edwards under the due process factors and guideposts mandated by this Court.

Key petitioned the Oregon Supreme Court for review. Thereafter, the Oregon Supreme Court decided *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 484 (Or. 2001), 133a-168a, which affirmed that an award of punitive damages satisfies due process if it is within the range that a "rational juror" could award. In light of that decision, the Oregon Supreme Court summarily vacated the Court of Appeals' decision and remanded for reconsideration.

On remand, the Oregon Court of Appeals reconsidered only whether the award of punitive damages to Dr. Edwards was unconstitutionally excessive. *Bocci II*, 1a-11a. The court concluded that the "rational juror" rule was adequate to satisfy Key's constitutional right to judicial review of punitive damages. 10a. The court rejected Key's argument that the punitive damages were given improperly as punishment for all harm or potential harm caused by a nationwide course of conduct. 8a-9a. And the court refused to consider the disproportionate relationship between Dr. Edwards' compensatory and punitive awards on the erroneous ground that "Key did not preserve this issue in the trial court." 11a.[10] Thus, the

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[9] The concurrence stated: "Key does not suggest anything that a reviewing court should review for *other than* statutory and common law factors, and we are unable to discern any other factors that the United States Supreme Court has deemed to be required in order to satisfy due process." *Bocci I*, 45a-46a (Riggs, J., concurring) (emphasis in original).

[10] Both the concurrence in the first court of appeals decision and the appeals court's opinion on remand assert that Key argued in the trial court only that the *total* punitive damages awarded to Bocci and Dr. Edwards were excessive and did not argue that the punitive damages awarded to Dr. Edwards were excessive standing alone. This *ipse dixit* conclusion cites no reference to the record and is flatly contradicted by that record. Key argued in post-verdict motions that the two awards of punitive damages, alone and in combination, were

(Continued on following page)

Court of Appeals decided that the award of punitive damages to Dr. Edwards was not unconstitutionally excessive while dismissing, without justification, the methodology prescribed by this Court for deciding that question. The Oregon Supreme Court denied discretionary review of the second Court of Appeals decision. 73a.

REASONS FOR GRANTING THE WRIT

This case offers the Court an opportunity to address several important issues regarding the appellate review of punitive damages awards that *Oberg* held is required by the Due Process Clause of the United States Constitution.

The Oregon appellate courts failed to set aside, modify, or indeed even to review under the *BMW* guideposts, a punitive damages award to Dr. Edwards that was premised on evidence, argument and instructions taking into account Key's nationwide promotion of the drug Theo-Dur. The resulting $22.5 million punitive damages award to Dr. Edwards bears no reasonable relationship to the extremely generous compensatory award of $500,000. That award also was cumulative to a $35 million punitive damages award to Plaintiff based on the same evidence, the same argument and the same instruction. Moreover, the jury making that award was only partially advised of the agreement under which Dr. Edwards, who appeared as a defendant/cross-claimant, had forged a unity of interest with Plaintiff and had acquired a financial interest in Plaintiff's claim.

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excessive. Defs.' Mot. for J. Notwithstanding the Verdict or, in the Alternative, for a New Trial or Remittitur, 81a-82a; Defs.' Reply Mem. in Support of Mot. for J. Notwithstanding the Verdict, 87a-88a. Moreover, on appeal, Dr. Edwards defended the punitive damages awarded to him and never contended that Key had waived its right to claim that the award was unconstitutionally excessive. *See* Cross-Claim Resp't Br., 105a ("Given the evidence . . . certainly a rational jury *could* award $22,500,000 to punish Key . . . ").

By reviewing the Oregon appellate court's decision, this Court can give clear guidance as to whether *BMW* requires proportionality to be tested only against the harm incurred by the plaintiff seeking the award rather than all possible harms (however speculative) arising from those acts of defendant causing plaintiff's injury, and whether an award 45 times greater than a generous award of compensatory damages for emotional distress and injury to reputation can withstand *BMW* review. Even assuming the award to Dr. Edwards can survive that examination, the Court can provide additional guidance as to whether this punitive damages award is unconstitutionally excessive when:

(a) the jury was permitted to consider harms caused by Key's national marketing campaign outside the borders of Oregon;

(b) the jury was permitted to impose that award in addition to another substantial punitive damages award designed to punish and deter the same conduct; and

(c) the Oregon courts restricted their review to determining whether the award was within the range that a "rational juror" might impose.

These issues are urgent beyond the confines of this case, because Oregon appellate courts continue to avoid the searching judicial review commanded by *Oberg* and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and litigants in Oregon are subject to differing consequences regarding punitive damages depending upon the choice of federal or state court.

Finally, this case warrants review by this Court for the additional compelling reason that the trial below lacked minimally adequate procedural protections against the unlawful deprivation of property. The presentation of evidence to the jury was fatally distorted by the trial court's treatment of the collusive agreements between Plaintiff and Dr. Edwards. The court refused to disclose the complete arrangement to the jury, endorsed the procedural disadvantages to Key which the agreement imposed, allowed Dr. Edwards to claim injury for a lawsuit which

his agreement directly invited, and denied Key the opportunity to present evidence and to pursue cross-examination of witnesses to expose the bias which prejudiced Key's position before the jury. Because the trial court disregarded these time-honored and nearly universally accepted common law rules, the inherently subjective calculus by which the reprehensibility of conduct is assessed in punitive damages cases was weighted against Key beyond limits imposed by the Fourteenth Amendment. This Court should grant *certiorari* to consider the extent to which the due process clause protects against procedures which overtly prejudice a jury's assessment of culpability and its determination of the appropriate measure of punishment.

Key recognizes that the issues of proportionality and punishment for extraterritorial conduct raised in this case may be addressed in *State Farm Mutual Automobile Insurance Co. v. Campbell*, No. 01-1289 (*cert. granted* June 3, 2002) and that disposition of those issues in *State Farm* could result in vacation and remand of this case. The Court thus may find it appropriate to withhold action on this petition until after its decision in *State Farm*.

To the extent *State Farm* is not resolved on the basis of these issues, this case provides a vehicle for the Court to set forth clear rules. Otherwise, state courts will continue to permit virtually unbounded punitive damages awards. Such awards against corporations that place a product in interstate commerce have the impact of punishing nationwide companies for their size and wealth instead of punishing for harm and deterring future wrongdoing. This case also raises the issue of repetitive and cumulative punitive damages awards that frequently confront nationwide product distributors, and a procedural due process issue concerning the fairness of trial procedure. These issues are not presented in *State Farm* and warrant independent review by this Court.

For these reasons and those set forth below, the Court should grant the petition for writ of *certiorari* in this case.

I. THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE APPLICATION OF THIS COURT'S DECISIONS TO MULTIPLE PUNITIVE DAMAGES AWARDS BASED UPON NATIONWIDE CONDUCT.

The power of a jury in a civil action to "impose a punishment on the defendant and hold up an example to the community," has deep roots in Anglo-American common law. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991) (Scalia, J., dissenting) (quoting THEODORE SEDGWICK, MEASURE OF DAMAGES 522 (4th ed. 1868)). Historically, punitive damages typically were awarded in cases involving harm to one or a few individuals. *Id.* Today, companies such as Key, which market products in interstate commerce, can become exposed to hundreds or even thousands of potential civil claims by a single act or course of conduct. The fact that the seller may be punished by multiple juries for the same conduct and for causing the same harm creates a very substantial risk of multiple, redundant, and excessive punishment.[11] That risk lies at the core of the longstanding concern of this Court with the constitutionality of certain punitive damages awards. *See Haslip*, 499 U.S. at 9-12 (reviewing concerns expressed by the Court and individual justices). This case, which includes two separate awards of punitive damages for the

[11] "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); *see also Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir. 1993) (directing district courts to consider whether repeated awards may put defendants out of business to the detriment of future litigants with legitimate compensatory claims); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990) (expressing concern that multiple punitive damages awards will eventually litigate defendant out of existence).

same conduct and consequences, provides a unique opportunity for the Court to address the problem of cumulative punishments.

In recent years, this Court has identified several constitutional standards that, if properly applied, substantially mitigate the risk that multiple awards of punitive damages for the same conduct will be unconstitutionally excessive. First, the Court has declared that any award of punitive damages must bear a reasonable relationship to the harm or potential harm suffered by the plaintiff. *BMW*, 517 U.S. at 580; *Cooper Industries*, 532 U.S. at 433-35. Second, the Court implicitly has recognized that a state's legitimate interests are limited to imposing punishment for harm caused within the state. *BMW*, 517 U.S. at 570. Third, the Court requires that jury awards of punitive damages be subject to searching judicial review. *Oberg*, 512 U.S. at 434; *Cooper Industries,* 532 U.S. at 436. This Court has not yet applied any of the foregoing principles in a case where a defendant has been subjected to multiple punitive damages awards for the same conduct.

Typically, multiple punitive damages awards will arise in successive cases – perhaps cases arising in multiple jurisdictions. Here, a single jury, in a single case, awarded punitive damages to two different claimants, for the exact same conduct – with the State of Oregon entitled to 50% of each award.[12] This case thus presents the Court with an exceptional vehicle to address a constitutional issue of nationwide importance – whether the due process clause

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[12] In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263-64 (1989), this Court held that the Eighth Amendment excessive fines clause "does not constrain an award . . . when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded," leaving undecided the question of whether the Eighth Amendment *does* constrain awards in which the state will receive a share of damages. In this case, Oregon by state statute stands to collect 50% of *each* of Plaintiff's and Dr. Edwards' punitive damages award.

allows states to use punitive civil damages to inflict multiple monetary punishments for the same offense.

A. Oregon Courts Impermissibly Permit Disproportional and Cumulative Punitive Damages Awards With Each Punishing All Harm Caused by Defendant's Conduct.

In this case, as in all cases in the Oregon courts, there is no requirement that punitive damages be proportional to the actual harm inflicted on the plaintiff.[13] Here, Dr. Edwards suffered, at best, only modest emotional distress. He knew from his "Mary Carter" settlement with Plaintiff that he would be a defendant in a lawsuit by his own agreement, that his own liability was capped and that no judgment would ever be enforced against him. He had no physical injury, sought no treatment for his emotional distress, and had no other related injuries such as lost income. The $22.5 million in punitive damages awarded to Dr. Edwards in comparison to his $500,000 compensatory damages award for his claim of emotional distress and injury to reputation creates a 45:1 ratio. The 45:1 ratio of punitive to compensatory damages is wholly inexplicable when it is compared to the 6.2:1 ratio represented by the same jury's punitive damages award to the far more seriously injured plaintiff for the exact same conduct. No logic can explain why a reviewing court would accept these ratios. Disproportionality is not a factual finding; it is judicially noticeable. The reviewing court's refusal to consider the gross disproportion cannot be permissible under *BMW*, *Oberg* or *Cooper Industries*.

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[13] The Oregon Supreme Court has explicitly endorsed punitive damages awards calculated to punish for harm not only to the plaintiff, but to the plaintiff and all other affected or potentially affected victims. *Parrott*, 166a ("Because defendant's tortious conduct was a routine part of its business practice that it was unwilling to change, we also consider the potential injury that its misconduct may have caused to past, present, and future customers.").

Yet, in a demonstration of their unwillingness to probe the basis of a jury's verdict, the Oregon courts failed even to examine the disproportionate ratio of the punitive damages to compensatory damages awarded Dr. Edwards. See *Bocci I*, 45a-46a (Riggs, J. concurring) (failing to analyze ratio). Despite the holding in *BMW* three years earlier, the court explained "we are unable to discern any other factors [other than statutory and common law factors] that the United States Supreme Court has deemed to be required in order to satisfy due process." *See also Bocci II*, 11a (refusing to consider ratio despite the fact that defendant raised due process concerns regarding the amount of the punitive damages award before the trial court).[14]

Moreover, "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW*, 517 U.S. at 568. This Court has recognized that punitive damages properly may be imposed to further a state's legitimate interest in punishing unlawful conduct and deterring its repetition. *Haslip*, 499 U.S. at 22.

A state can have no legitimate interest in punishing a defendant repeatedly for the same conduct. Such punishment, when aggregated, necessarily will be disproportional to the harm caused by the defendant. *See BMW*, 517 U.S. at 581-82 (citing *Haslip* and *TXO Prod. Corp. v.*

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[14] Social science research indicates that, in the absence of strong judicial oversight, the award of punitive damages by juries is "a decision process that is unreliable, erratic, and unpredictable." Reid Hastie, *Putting it All Together*, *in* CASS R. SUNSTEIN, ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE, 211, 241 (2002) [hereinafter HOW JURIES DECIDE]. The extensive controlled studies there reported lead the author to conclude that "[j]urors' good intentions and high level of motivation were thwarted by the inherent complexity of the legal decision task and by the lack of clear instructions or other effective guidance." *Id.*

Alliance Resources Corp., 509 U.S. 443 (1993)).[15] It is fundamentally unfair to allow repetitive punishment for the same conduct. *E.g., Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873) (describing the "maxim" in civil cases that "no man shall be twice vexed for one and the same cause").[16]

The Oregon courts ignored these teachings and committed constitutional error by affirming a duplicative and excessive award of punitive damages. The jury was permitted to determine an award for Plaintiff and an award for Dr. Edwards each based on all of Key's misconduct and all of the harm or potential harm that it caused. The jury was instructed that "[i]n order for plaintiff or Dr. Edwards to recover punitive damages against the defendants each must prove by clear and convincing evidence that defendants have shown wanton disregard for the health, safety and welfare of others." Tr. 4307. The jury was handed two separate verdict forms, one asking

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[15] If the punitive damages awarded both to Bocci and to Dr. Edwards each need only bear a reasonable relationship to the total harm caused by Key's conduct, however, then, by definition, the combined awards must be disproportionate to that same harm. Here the prayer for punitive damages was increased after the close of evidence by both Dr. Edwards and Plaintiff based on a trial court finding that it would conform to the evidence. That amount is actually based on a document that indicated that Key stood to lose $35 million in sales to generic theophylline products. Regardless of whether such evidence can be a proxy for actual harm, an award of $22.5 million *in addition to* an award of $35 million, is necessarily greater than even the evidence of harm accepted by the trial court.

[16] *See also United States v. Throckmorton*, 98 U.S. 61, 65 (1878) ("There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, interest *rei publicae, ut sit finis litium*, and *nemo debet bis vexari pro una et eadam causa*." or "no maxim[ ] of the law [is] more firmly established, or of more value in the administration of justice, than" no man shall be twice vexed for one and the same cause); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1866) (same).

"What are the Plaintiff Paul Bocci, III's punitive damages?" and one asking "What are Plaintiff [sic] Dr. Edwards' punitive damages?" Each form instructed that the award could not exceed $35 million and had a blank space in which the jury could fill in the award.[17] 124a, 130a.

The Oregon Court of Appeals has considered the issue of redundant punitive awards in another case, and acknowledged that a defendant may be "legitimately concerned that there may be future punitive damages awards that, combined with the one in this case, would be excessive in total. . . . " *Williams v. Philip Morris Inc.*, 48 P.3d 824, 841 (Or. Ct. App. 2002). Nevertheless, the court of appeals has concluded that if one jury is not permitted to punish a defendant for all of the harm caused by the defendant's misconduct, the punitive damages imposed "may be inadequate, based on speculation of what might happen in some unknown future case." *Id.* Such concern is misplaced: States cannot put their own desire to impose maximum punishment ahead of the constitutional guarantee against deprivation of property without due process of law. "[D]ue process mandates at all times, in all circumstances, and for all defendants, 'fundamental fairness' at the hands of the law." John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 152 (1986).

Multiple awards of punitive damages that, in combination, are greater than necessary to punish and deter cannot be justified by the goal of ensuring that each plaintiff has an opportunity to win such an award. This Court has long recognized that punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert*

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[17] Empirical studies reveal that "salient numbers, such as a plaintiff's request for a specific dollar amount, have a dramatic impact on the jurors' awards [of punitive damages]. Reid Hastie, *Putting it All Together*, *in* HOW JURIES DECIDE, 211, 240.

Welch, Inc., 418 U.S. 323, 350 (1974); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting). Even the Oregon Supreme Court has recognized that punitive damages are purely a means of effecting punishment and deterrence and do not serve as a "means of redress" to which plaintiffs have an individual right of recovery. *DeMendoza v. Huffman*, ___ P.3d ___, 334 Or. 425 (2002).

The Oregon courts have failed to follow the clear direction of the Court in *BMW*, *Oberg*, and *Cooper Industries*, and have permitted to stand a cumulative award of punitive damages that, by any standard, is grossly excessive because it is not justified by Oregon's legitimate interest in punishment and deterrence of wrongful conduct and bears no reasonable relationship to the harm to Dr. Edwards caused by Key's conduct.

B. Oregon Courts Impermissibly Rely Upon Out Of State Conduct To Justify Punitive Damages Awards.

This case also presents the Court with an opportunity to preclude states from imposing punitive damages for consequences outside their borders. This is an issue of critical importance because it impacts principles of sovereignty, comity, and interstate commerce, as well as the legitimacy of permitting jury speculation without the benefit of proof concerning harms occurring elsewhere.

Ignoring the message of *BMW*, the Oregon courts permitted the jury to impose punitive damages awards as punishment for Key's marketing campaign throughout the United States.[18] At trial, all of the evidence and argument

[18] The Court of Appeals' contention that Key "was not punished for its promotional activities outside of Oregon – it was punished for failing to warn [the Oregon plaintiffs'] physicians," *Bocci II*, 8a (citations omitted), is belied by its justification of the large award because "Key's

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concerning punitive damages focused on the need to punish Key for all of the supposed harm caused by its nationwide marketing campaign. Both Plaintiff and Dr. Edwards claimed that a punitive damages award of $35 million was necessary to deter Key's nationwide conduct because Key's conduct was motivated by its desire to avoid an estimated loss of $35 million in nationwide sales to competitors' generic drugs. On appeal, Dr. Edwards justified the punitive damages award to him on the ground that it was necessary to punish Key's "aggressive marketing . . . all over the country." Cross Resp't Br., 108a.

The shocking size of the damages award – $22.5 million – and its extreme disproportion to the compensatory damages – 45:1 – confirm that it was impermissibly based upon a whole host of nationwide actions that Dr. Edwards claimed Key undertook and on Key's national presence and financial strength. The Oregon trial court upheld the award based in part on the "gargantuan size of defendant's [sic] companies," Trial Court Opinion Denying Post-Trial Motions, 91a, holding that the punitive damages were "appropriately proportional in relation to the damages caused when compared with defendants' financial condition." *Id.* at 90a. The award in this case can only be explained "by the jury's raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state, corporate defendant." *TXO,* 509 U.S. at 468 (Kennedy, J., concurring). A defendant's wealth cannot justify an award that is excessive under the *BMW* guideposts. *BMW*, 517 U.S. at 566 (reversing state supreme court decision upholding punitive damages that was based "in part on state court's conclusion that damages" would not have a "substantial impact upon [BMW's] financial position.").[19] The

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aggressive marketing of Theo-Dur as 'safe' and superior to other products . . . was quite effective in maintaining a strong market for its drug . . . [in] a declining market for theophylline products." *Id.*

[19] *See also Oberg*, 512 U.S. at 432 ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their

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trial court's improper emphasis on the "gargantuan size" of Key, without connecting that size in any way to its market share within Oregon or any other Oregon-specific activities, impermissibly reaches beyond the confines of Oregon's borders to punish national behavior.

C. Oregon's Rational Juror Standard Does Not Provide The Critical Review Of Punitive Damages Awards That Due Process Requires.

In *Oberg*, this Court held that the Fourteenth Amendment required Oregon courts to provide meaningful judicial review of punitive damages awards. Since *Oberg*, the Oregon appellate courts, while paying lip service to this Court's teachings, have steadfastly avoided that constitutional mandate.

In Oregon, judicial review of jury awards of punitive damages involves nothing more than the application of the court's "own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution." *TXO*, 509 U.S. at 466-67 (Kennedy, J., concurring). As Justice Kennedy observed, "[t]his type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend." *Id.* at 467. Rather than the rigorous de novo review required by this Court, Oregon directs its courts to affirm a jury's award of punitive damages if it is "within the range that a rational juror

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verdicts to express biases against big businesses, particularly those without strong local presences."); *BMW*, 517 U.S. at 585 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business."); *id.* at 591 (Breyer, J. concurring) (Corporate finances cannot be used as "an open-ended basis for inflating awards when the defendant is wealthy.")

would be entitled to award in light of the record as a whole." *Parrott*, 154a.[20]

Oregon's "rational juror" rule is a sufficiency of the evidence standard,[21] which relegates the core constitutional guideposts enunciated in BMW merely to "additional factors for the reviewing court in Oregon to consider as part of the *Oberg* (state) rational juror review." *Parrott*, 154a. In other words, in Oregon, this Court's constitutional standard is reduced to one of the myriad factors a court considers in making the subjective decision as to whether an award of punitive damages is supported by the record. By reshaping the constitutional inquiry in this way, the Oregon Supreme Court effectively has returned to the days before *Oberg* when a jury's punitive damages verdict would not be disturbed so long as there was any evidence to support it.[22]

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[20] The Oregon Supreme Court adopted this standard on remand of this Court's *Oberg* decision. *Oberg v. Honda Motor Co.*, 888 P.2d 8 (Or. 1995), *cert. denied*, 517 U.S. 1219 (1996) (hereinafter *Oberg* (state)). The Oregon court reaffirmed the "rational juror" rule in *Parrott*, after this Court decided *BMW*.

[21] This sufficiency of the evidence standard, which evolved from *Jackson v. Virginia*, 448 U.S. 307 (1979), has no place in determining the constitutionality of civil punishment. *Jackson* established a sufficiency of the evidence standard for review of a criminal conviction. However, in the criminal context the jury is held to a much higher "beyond a reasonable doubt" standard in making its determination. Divorced from the rigorous criminal standard of proof, a sufficiency of the evidence standard of review does not meet the more searching standards required by the Court's punitive damages jurisprudence.

[22] Professor Sunstein summarizes the massive empirical study that he and his academic colleagues performed of juror behavior with the observation that "people have a hard time in arriving at consistent, predictable judgments *when using the scale of dollars* – even when their moral judgments are both consistent and predictable." Cass R. Sunstein, *From Outrage to Dollars: Introduction*, *in* HOW JURIES DECIDE, 29, 29 (emphasis in original). Mere sufficiency of the evidence review will do little to remedy this tendency; Sunstein finds a "major source of this unpredictability comes from the fact that people do not know how to 'translate' their moral judgment into dollar amounts." *Id.*

In *TXO*, this Court expressly rejected a rational basis review for punitive awards because, "[u]nder respondents' rational basis standard, apparently *any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." *TXO*, 509 U.S. at 456 (emphasis in original). Read together, *BMW* and *Cooper Industries* make it clear that due process requires a court to give less deference to the jury's determination than the rational juror standard permits. Certainly, a reviewing court must accept the jury's findings of fact unless they are clearly erroneous. *Cooper Industries*, 532 U.S. at 440 n.14. This Court in *Cooper Industries*, however, held that the amount of punitive damages awarded by a jury is not a finding of fact to which a court should defer. *Id.* at 437. Oregon courts have no state constitutional command respecting judicial review of punitive damages, and the Oregon Constitution contains no due process clause. Oregon courts therefore bear a responsibility in the first instance directly to apply the federal constitutional standards articulated in BMW – to conduct "an independent examination of the relevant criteria [established in *BMW*]." *Id.* at 435.

Judicial review of punitive damages in Oregon has been reduced to a subjective process completely unhooked from the standards for review identified by this Court. Both the method and effect of Oregon's review of punitive damages is seriously out of step with the decisions of this Court and other lower courts, including the Ninth Circuit within which Oregon lies. *See, e.g., Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1148 (9th Cir. 2002) (applying "independent review" of punitive damages award in Oregon case); *In re Exxon Valdez*, 270 F.3d 1215, 1240 (9th Cir. 2001) (applying "independent review" standard).

Perhaps the most startling result of Oregon's sufficiency of the evidence review process is the prevalence of punitive damages "run wild," *Haslip*, 499 U.S. at 18, and bearing no reasonable relationship to the harm suffered by the plaintiff. Oregon courts routinely embrace shockingly high ratios – including the 45:1 ratio in this case – dismissing the

reasonable relationship requirement with the incantation that this Court has rejected a "simple mathematical formula."[23] According to the Oregon courts, the requirement that a punitive damages award be proportional to the harm caused to the plaintiff has no separate meaning, and may be overwhelmed by other, qualitative considerations. Having dispensed with this quantitative limitation, punitive damages are left solely to the unfettered discretion of the judge and jury – a result that neither the Constitution, nor this Court should tolerate. *Haslip*, 499 U.S. at 18; *Oberg*, 512 U.S. at 432; *BMW*, 517 U.S. at 568.

This case fully demonstrates that Oregon courts are not conducting the meaningful judicial review of punitive damages awards required by federal due process. In a series of post-*Oberg* decisions, Oregon courts have approved thirteen of the fourteen punitive damages jury verdicts they have considered.[24] In the fourteenth case, the Court of Appeals ordered a remittitur, but the Oregon Supreme Court has allowed review to consider, *inter alia*, whether the Court of Appeals erred in reducing the jury's award of punitive damages from $1.25 million to $175,000. *Jensen v. Medley*, 11 P.3d 678 (Or. Ct. App. 2000), *review allowed*, ___ P.3d ___, 334 Or. 411 (July 23, 2002). In four cases, the appellate courts have restored jury verdicts that had been remitted by the trial court.[25] These decisions

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[23] *See Parrott*, 17 P.3d at 489 (approving an 87:1 ratio and reinstating the jury's punitive damages verdict that had been reduced by the trial court); *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 841 (Or. Ct. App. 2002) (approving a 97:1 ratio and reinstating a $79.5 million punitive damages verdict that had been reduced to $32 million by the trial court).

[24] The post-*Oberg* appellate court decisions concerning punitive damages are summarized in a chart at 118a.

[25] *Parrott*, 133a-168a (Or. 2001) ($1 million award reinstated after trial court had remitted to $50,000 and Court of Appeals had increased remittitur to $300,000); *Philip Morris Inc.*, 48 P.3d at 840-42 ($79.5 million award reinstated after trial court had remitted to $32 million); *Stranahan v. Fred Meyer, Inc.*, 958 P.2d 854, 871-72 (Or. Ct. App. 1998),

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have been justified on the ground that the punitive damages were "within the range that a rational jury would be entitled to award in light of the record as a whole." *Oberg* (state), 888 P.2d at 12; *Parrott*, 154a. And in the seven years that this case was before the Oregon appellate courts, no Oregon court or judge has ever directly applied the *BMW* guidelines to the punitive damages award under review.

II. THE COLLUSIVE ARRANGEMENT BETWEEN PLAINTIFF AND DR. EDWARDS DEPRIVED KEY OF DUE PROCESS OF LAW AND UNCONSTITUTIONALLY LIMITED THE JURY'S ABILITY TO EVALUATE TRUE CULPABILITY.

The "presumption of validity" accorded a punitive damages judgment that is the product of a fair process, *TXO*, 509 U.S. at 457, does not apply to a case such as this one, where the trial procedure so skewed the adversary process as to make it impossible for the jury to evaluate the culpability of Key. As a result of the pervasive effects of the Mary Carter agreement, the "reasonable relationship" between Dr. Edwards' actual damages and the punitive damages awarded to him was unconstitutionally distorted.

Throughout the trial, Dr. Edwards participated not as a defendant, but as a "stealth plaintiff" whose only true interest was not to prove his own innocence, but rather to prove Key's alleged liability. See *Bocci I*, 57a (Landau, J., dissenting). The trial court refused to provide Key with any meaningful procedural protections against the Mary Carter agreement: Key was not allowed to offer the Mary Carter agreement into evidence (despite clear Oregon law requiring its admission), *id.* at 62a; Key was not allowed to cross-examine Dr. Edwards about the agreement; and Key was not allowed to cross-examine Plaintiff's witnesses

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rev'd on other grounds, 11 P.3d 228 (Or. 2000) ($2 million award reinstated after trial court had remitted to $375,000).

about Dr. Edwards' culpability. *Id.* at 57a. This complete lack of procedural protections allowed the jury to overlook the actual relationship between Key's alleged acts toward Dr. Edwards and the alleged harm suffered by Dr. Edwards, as opposed to the unfortunate harm suffered by Plaintiff. The unfairness of the arrangement was aggravated by Plaintiff's voluntary dismissal of his claims against Dr. Edwards, and the trial court's statement that "the court" rather than a pre-trial settlement was responsible for Dr. Edwards' dismissal.

Whether a trial is fair involves two related inquiries. This Court has often found that proceedings violate due process where a party has been deprived of a well-established common law protection against arbitrary and inaccurate adjudication. *Oberg*, 512 U.S. at 432. The Court also has evaluated the adequacy of a hearing procedure by considering: 1) the nature of the private interest involved; 2) the risk of an erroneous deprivation and the likelihood that additional procedural protections would reduce that risk; and 3) the government's interest in avoiding more cumbersome and expensive procedures. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Under either of these analyses, the trial procedure in this case was constitutionally deficient.

Collusive agreements of the sort that Plaintiff and Dr. Edwards made here have troubled courts for decades. Seven states have ruled that such agreements are void because of, among other things, the way that they distort the adjudicative process.[26] States that allow the agreements, and which have considered the matter, have ruled

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[26] *Dosdourian v. Carsten*, 624 So.2d 241, 246 (Fla. 1993); *Babb v. City of Champaign*, 642 N.E.2d 1195, 1203 (Ill. 1994); *Lum v. Stinnett*, 488 P.2d 347, 351 (Nev. 1971); *Watson Truck & Supply Co. v. Males*, 801 P.2d 639 (N.M. 1990) (Wilson, J., concurring) (would find agreements void); *Cox v. Kelsey-Hayes Co.*. 594 P.2d 354, 360 (Okla. 1978); *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992); *Trampe v. Wisconsin Tel. Co.*, 252 N.W. 675, 677-78 (Wis. 1934).

that a defendant not a party to the agreement must be given a reasonable opportunity to demonstrate the bias that these agreements create.[27] This universal rule follows from the time-honored principle that bias on the part of parties and witnesses is always relevant. Somehow, the Oregon courts concluded that the agreement between Plaintiff and Dr. Edwards could not be received in evidence because it was a settlement agreement. Thus while Plaintiff and Dr. Edwards colluded to portray Key as the "bad defendant" and Dr. Edwards as the "good defendant," Key was prevented by the Court from disclosing to the jury the documents that set the conspiracy in motion.

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[27] *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745, 757 (Alaska 1992); *City of Tucson v. Gallagher*, 493 P.2d 1197, 1199-1200 (Ariz. 1972); *Firestone Tire & Rubber Co. v. Little*, 639 S.W.2d 726, 727-28 (Ark. 1982); *Abbott Ford, Inc. v. Super. Ct.*, 741 P.2d 124 (Cal. 1987); *Stubbs v. Copper Mountain, Inc.*, 862 P.2d 978, 985-86 (Colo. Ct. App. 1993), *aff'd, Copper Mountain, Inc. v. Poma of Am.*, 890 P.2d 100, 109 (Colo. 1995); *Northland Ins. Co. v. Bashor*, 494 P.2d 1292, 1293-94 (Colo. 1972); *Doty v. Bishara*, 848 P.2d 387, 392-93 (Idaho 1992); *Northern Indiana Pub. Serv. Co. v. Otis*, 250 N.E.2d 378, 391-92 (Ind. Ct. App. 1969); *Ratterree v. Bartlett*, 707 P.2d 1063, 1075-76 (Kan. 1985); *Clement v. Armoniet*, 527 So. 2d 1004, 1010-11 (La. Ct. App. 1988); *Dongo v. Banks*, 448 A.2d 885, 890-91 (Me. 1982); *General Motors Corp. v. Lahocki*, 410 A.2d 1039, 1042-43 (Md. 1980); *Franklin v. Guralnick*, 477 N.E.2d 405, 406-07 (Mass. 1985); *Smith v. Childs*, 497 N.W.2d 538, 539-40 (Mich. Ct. App. 1993); *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 556-57 (Minn. 1977); *Hegarty v. Campbell Soup Co.*, 335 N.W.2d 758, 764-65 (Neb. 1983); *Bedford School Dist. v. Caron Constr. Co.*, 367 A.2d 1051, 1054-55 (N.H. 1976); *Vogel v. Wells*, 566 N.E.2d 154, 156-57 (Ohio 1991); *Grillo v. Burke's Paint Co.* 551 P.2d 449, 453-54 (Or. 1976); *Hatfield v. Continental Imports, Inc.*, 610 A.2d 446, 451-52 (Pa. 1992); *Poston v. Barnes*, 363 S.E.2d 888, 890-91 (S.C. 1987); *Corn Exch. Bank v. Tri-State Livestock Auction Co.*, 368 N.W.2d 596, 599-600 (S.D. 1985); *Whittemore v. Classen*, 808 S.W.2d 447, 450-51 (Tenn. Ct. App. 1991); *Slusher v. Ospital*, 777 P.2d 437, 441-42 (Utah 1989); *Vermont Union School Dist. v. H. P. Constr. Co.*, 469 A.2d 742, 749-51 (Vt. 1983); *Jensen v. Beaird*, 696 P.2d 612, 618-19 (Wash. Ct. App. 1985); *Reager v. Anderson*, 371 S.E.2d 619, 629-30 (W. Va. 1988).

Even more disturbing, the trial court prevented Key from cross-examining Dr. Edwards about the agreement and the way that it affected his interests. Dr. Edwards claimed that he suffered emotional distress in part because he had been sued by his patient. Yet the trial court prevented Key from proving through cross-examination that Dr. Edwards had bargained with Plaintiff to be sued so that he could have a chance to clear his name. Tr. 1386. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Here Oregon courts cut off Key's right to cross-examine Dr. Edwards about facts critical to his claim.

Applying the *Mathews v. Eldridge* calculus to this case also reveals the constitutional deficiency of the Oregon proceedings here. A jury called upon to award punitive damages "must make a qualitative assessment," *TXO*, 509 U.S. at 475, that is quite different in character from the jury's normal fact finding mission. The jury must evaluate moral blameworthiness, determine the degree of reprehensibility of the conduct, and set the financial penalty that is needed to punish and deter. These judgments are inherently subjective and, as was the case here, rarely is the jury "instructed on how to effectuate those goals or whether any limiting principles exist." *Id.* at 473 (O'Connor, J., dissenting). The very nature of the exercise of assigning blame heightens the risk that the jury's decision will be shaped by improper considerations and that "arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict." *Id.*

Given the heightened risk of an erroneous deprivation inherent in the nature of punitive damages, and considering the stigma attached to an award of punitive damages, and the enormous size of the potential penalty, due process should require, at a minimum, that a defendant be permitted substantial latitude to explore the bias and motives of the parties seeking to impose such a penalty. Key here was deprived of a fair trial because it was prevented from demonstrating the effect that the collusion between

Dr. Edwards and Plaintiff had on appearances at trial. The Court should grant *certiorari* to establish that, when substantial punitive damages are at issue, the trial procedures here are inadequate to satisfy due process.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of *certiorari*. After *State Farm* is decided the Court will be better able to assess the extent to which this case is controlled by its result and whether a grant of this petition would require the decision below to be vacated and remanded. Thus, the Court may wish to take no action on this petition pending disposition of *State Farm*.

Respectfully submitted,

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APPENDIX

A. State Appellate Decisions in *Bocci v. Key Pharmaceuticals, Inc.* ..... App. 1

1. 2001 Court of Appeals of Oregon Opinion, *Bocci v. Key Pharmaceuticals, Inc.*, 35 P.3d 1106 (Or. Ct. App. 2001) ("Bocci II") ..... App. 1

2. 1999 Court of Appeals of Oregon Opinion, *Bocci v. Key Pharmaceuticals, Inc.*, 974 P.2d 758 (Or. Ct. App. 1999) (en banc) ("Bocci I") .... App. 12

3. 2001 Supreme Court of Oregon Remand Order, *Bocci v. Key Pharmaceuticals, Inc.*, 22 P.3d 758 (Or. 2001) ..... App. 71

4. 2002 Supreme Court of Oregon Denying Review, *Bocci v. Key Pharmaceuticals, Inc.*, 47 P.3d 486 (Or. 2002) ..... App. 73

B. OR. REV. ST. §18.540 (1993), Punitive Damages ..... App. 74

C. Excerpts of Record ..... App. 76

1. Defendant Key Pharmaceuticals' Motion to Dismiss, or in the Alternative, to Have the Mary Carter Agreement Declared Void ..... App. 76

2. Motion of Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation and Schering Corporation for Judgment Notwithstanding the Verdicts or, in the Alternative, for a New Trial or Remittitur ..... App. 79

3. Reply Memorandum of Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation and Schering Corporation in Support Of Motion for Judgment Notwithstanding the Verdicts or, in the Alternative, for a New Trial or Remittitur ..... App. 86

APPENDIX – Continued

4. Opinion Denying Post-Trial Motions ..... App. 89
5. Appellants/Cross-Claim Appellants' Opening Brief ("AOB") ..... App. 92
6. Cross-Claim Respondent's Brief ..... App. 101
7. Appellants/Cross-Claim Appellants' Reply Brief ..... App. 110

D. Ratio of Compensatory To Punitive Awards In Oregon Post *Oberg v. Honda*, 512 U.S. 415 (1995) (Table) ..... App. 118

E. Judgment of the Circuit Court of Oregon, September 9, 1994 ..... App. 119

F. Judgment On Verdict of the Circuit Court of Oregon, September 9, 1994 ..... App. 127

G. *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001) ..... App. 133

35 P.3d 1106

Court of Appeals of Oregon.

Paul R. BOCCI, Jr., guardian ad litem for Paul R. Bocci, III, an incapacitated individual, Plaintiff,

v.

KEY PHARMACEUTICALS, INC., a foreign corporation, Schering-Plough Corporation, a foreign corporation, and Schering Corporation, a foreign corporation, Defendants,

and

Miles, Inc., an Indiana corporation, Miles, Inc., Pharmaceutical Division, an Indiana corporation, Legacy Health System, an Oregon corporation, Legacy Immediate Care Clinic, Frederick D. Edwards, M.D., and The Eugene Clinic, a partnership, Defendants.

Frederick D. Edwards, M.D., Respondent,

v.

Key Pharmaceuticals, Inc., a foreign corporation, Schering-Plough Corporation, a foreign corporation, and Schering Corporation, a foreign corporation, Appellants.

A9210-07050; A86556

Nov. 14, 2001.

Theophylline toxicity victim brought actions for negligence based against physician who prescribed theophylline-based medication and the manufacturer, and physician cross-claimed against manufacturer for negligence and fraud. The Circuit Court, Multnomah County, William C. Snouffer, J., entered judgment on jury verdict awarding physician and victim combined $57 million in punitive damages against the drug manufacturer. Manufacturer appealed. The Court of Appeals affirmed, 158 Or.App. 521, 974 P.2d 758. Manufacturer petitioned for review. The Supreme Court vacated opinion of the Court of Appeals, 332 Or. 39, 22 P.3d 758. On remand, the Court of

Appeals, Landau, P.J., held that award of $57 million in punitive damages did not violate due process.

Affirmed.

William F. Gary, Eugene, James E. Mountain, Jr., Salem, Sharon A. Rudnick, and Harrang Long Gary Rudnick P.C., Eugene, for appellants.

Daniel M. Holland, Ronald B. Terzenbach, Mary H. Spillane, Margaret A. Sundberg, and Williams, Kastner & Gibbs PLLC, Seattle, WA, for respondent.

Before LANDAU, Presiding Judge, and DEITS, Chief Judge, and BREWER, Judge.

LANDAU, P.J.

This case is before us on remand from the Oregon Supreme Court. Previously, we affirmed by an equally divided court the trial court judgment in favor of defendant Frederick D. Edwards on his cross-claim against defendant Key Pharmaceuticals, Inc. (Key). *Bocci v. Key Pharmaceuticals, Inc.,* 158 Or.App. 521, 974 P.2d 758 (1999) (en banc). The issue on which we divided concerned the validity and treatment of a Mary Carter agreement between plaintiff Bocci and defendant Edwards. *See id.* at 527-36, 974 P.2d 758 (Riggs, J. pro tempore, concurring), 548, 974 P.2d 758 (Edmonds, J., dissenting), 548-64, 974 P.2d 758 (Landau, J., dissenting). The concurring opinion also discussed the validity of a punitive damage award and concluded that the award did not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 545-47, 974 P.2d 758 (Riggs, J. pro tempore, concurring). The Supreme Court vacated our decision and remanded the case for reconsideration in light of its decision in *Parrott v. Carr Chevrolet,*

Inc., 331 Or. 537, 17 P.3d 473 (2001). *Bocci v. Key Pharmaceuticals, Inc.*, 332 Or. 39, 22 P.3d 758 (2001). On remand, we affirm, writing only to discuss whether the punitive damage award violates due process.

The pertinent facts are set forth in our previous opinions and will be summarized only briefly here. Plaintiff Bocci was a long-time user of defendant Key's prescription asthma medication Theo-Dur, a timed-release theophylline product. In October 1990, Bocci was prescribed the antibiotic ciprofloxacin for a skin rash, but failed to tell the prescribing physician that he was taking Theo-Dur. On October 27, 1990, Bocci went to an urgent care clinic where Edwards worked complaining of nausea, vomiting, and diarrhea. Edwards diagnosed gastroenteritis and sent Bocci home. Edwards did not diagnose theophylline toxicity, because Theo-Dur had been promoted to him as a safe drug, and he did not believe that a patient on a stable dose of the drug could develop a serious toxicity problem. Shortly after Edwards sent him home, Bocci experienced seizures and was admitted to a hospital emergency room. He was treated for theophylline toxicity. He suffered permanent brain damage from the seizures.

Bocci sued Key and Edwards, but entered into a Mary Carter agreement with Edwards that had the effect of limiting Edwards's potential liability for Bocci's injuries. Edwards cross-claimed against Key for negligence and fraud on the ground that Key had failed to provide adequate information concerning the potential toxicity of Theo-Dur. The jury returned verdicts in favor of Bocci and Edwards against Key. The jury awarded Bocci more than $5 million in compensatory damages and $35 million in punitive damages. The jury awarded Edwards $500,000 in

compensatory damages and $22 million in punitive damages.

Key moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur. It argued that the punitive damage awards needed to be reviewed as required by *Honda Motor Co. v. Oberg,* 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), and *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). Key made no distinct arguments pertaining to Edwards's punitive damage award, but it argued that the total punitive damage award of $57 million in favor of Bocci and Edwards was excessive because their "own errors gave rise to their injuries." Key summarized the procedures from *Haslip* as requiring that the trial court review the award and state on the record its reasons for concluding that the award is not excessive and as requiring the appellate court "to review the award to ensure that it is reasonable in its amount and rational in the light of the purpose of punishment and deterrence." It cited as relevant to post-verdict review the culpability of the defendant's conduct, the desirability of discouraging others from similar conduct, and the impact on the parties as well as the impact on innocent third parties. It also argued that the trial court's post-verdict review "should be guided by the criteria in ORS 30.925 [for product liability punitive damage awards], which resemble those in *Haslip* and will serve as minimums in the absence of a definitive ruling by the Oregon Supreme Court." Key then quoted the criteria from ORS 30.925(2):

"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

"(b) The degree of the defendant's awareness of that likelihood;

"(c) The profitability of the defendant's misconduct;

"(d) The duration of the misconduct and any concealment of it;

"(e) The attitude and conduct of the defendant upon discovery of the misconduct;

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

The trial court reviewed the award and concluded that it was not excessive.

On appeal, Key significantly changed its arguments. As noted in the concurring opinion in our previous decision:

> "Key argues for the first time on appeal that the trial court erred in failing to review the punitive damage award to Edwards independently of the punitive damage award to Bocci, because the statutory criteria from ORS 30.925 apply to strict liability punitive damage awards, and Edwards's claims involved negligence and fraud. Not only did Key fail to preserve this issue in the trial court, but it waived any argument on this point by specifically requesting the court to review the punitive damages awards in their entirety under the criteria listed in ORS 30.925."

Bocci, 158 Or.App. at 547, 974 P.2d 758 (Riggs, J., pro tempore, concurring). We adopt that reasoning from the concurring opinion. The narrow question before us now is whether, in light of the type of review of punitive damages

that Key sought, the trial court erred in concluding that the punitive damage award was not unconstitutionally excessive.

In *Parrott,* the jury awarded $1 million in punitive damages to a plaintiff who had been subjected to unlawful trade practices in the course of a sale of a used vehicle for $11,496. 331 Or. at 540, 17 P.3d 473. The court reiterated its previously announced standard for post-verdict judicial review:

> "'[T]he standard for post-verdict judicial review of an award of punitive damages is as follows: A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.'"

Id. at 548, 17 P.3d 473 (quoting *Honda Motor Co. v. Oberg,* 320 Or. 544, 549, 888 P.2d 8, *cert. den.* 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996)).[1]

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[1] In its opening brief, Key explicitly recognizes that "the trial court did an admirable job of predicting the standard that would be enunciated several months later by the Oregon Supreme Court [in *Oberg*]." We agree with Key that the trial court did, in fact, apply essentially the same standard as that quoted above.

Key goes on to argue, however, that the standard announced by the Oregon Supreme Court in *Oberg* fails to comport with due process. Given that the court necessarily concluded otherwise in *Parrott,* we reject that argument without further discussion.

The court further explained that the standard announced in *Oberg* was consistent with the United States Supreme Court's subsequent decision in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). *Parrott,* 331 Or. at 553, 17 P.3d 473. The court said that an award that is "grossly excessive" in violation of the Due Process Clause is one that is not within the range that a rational juror could award. *Id.* It went on to hold that the guideposts that the United States Supreme Court announced in *Gore* were factors for a court to consider "as part of the *Oberg* (state) rational juror review." *Id.* at 554, 17 P.3d 473. The court summarized the factors as follows:

> "(1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue, *Oberg* (state), 320 Or. at 549, 888 P.2d 8; (2) the state interests that a punitive damages award is designed to serve, *Gore,* 517 U.S. at 568, 116 S.Ct. 1589; (3) the degree of reprehensibility of the defendant's conduct, *id.* at 575, 116 S.Ct. 1589; (4) the disparity between the punitive damages award and the actual or potential harm inflicted, *id.* at 580, 116 S.Ct. 1589; and (5) the civil and criminal sanctions provided for comparable misconduct, *id.* at 583, 116 S.Ct. 1589."

Parrott, 331 Or. at 555, 17 P.3d 473.

Key first argues that both the jury and the court necessarily over-emphasized the financial condition of the defendant, which is only one of the relevant factors under ORS 30.925(2). We disagree. The jury specifically found by clear and convincing evidence that Key knowingly withheld information or misrepresented information concerning toxicity problems associated with Theo-Dur. Evidence

demonstrated that Key's aggressive marketing of Theo-Dur as "safe" and superior to other products not only misled Edwards, but also was quite effective in maintaining a strong market for its drug in the face of competition from generic drugs and a declining market for theophylline products. In short, the evidence demonstrated a strong connection between Key's profits and the misconduct for which punitive damages were awarded.

Key next argues that the punitive damage award was improper in light of the state interests that such an award is designed to serve. *BMW of North America, Inc.*, 517 U.S. at 568, 116 S.Ct. 1589. Key argues that its misleading marketing of Theo-Dur was part of a nationwide campaign and that the State of Oregon lacks any legitimate state interest in punishing its conduct outside of Oregon. We rejected a similar argument in *Axen v. American Home Products Corp.*, 158 Or.App. 292, 315, 974 P.2d 224, *adhered to on recons.* 160 Or.App. 19, 981 P.2d 340, *rev. den.* 329 Or. 357, 994 P.2d 124 (1999), *cert. den.* 528 U.S. 1136, 120 S.Ct. 979, 145 L.Ed.2d 930 (2000). That case, like this one, concerned a punitive damage award involving misleading promotion of a prescription drug that led to damages to an Oregon plaintiff. In *Axen*, we held that the defendant "was not punished for its promotional activities outside of Oregon – it was punished for failing to warn [the Oregon plaintiffs'] physicians" of a potential hazard of the drug involved. *Id.* at 315, 974 P.2d 224.

Key argues that *Axen* is distinguishable because the plaintiff in *Axen* was the patient of the physician who was not adequately warned whereas, in this case, the punitive damage award at issue was to the physician who was not adequately warned. That is not a viable distinction, however. The state's interests are identical, whether the

harmed party receiving the punitive damage award is a patient or a physician.

Key next argues that the third factor – the reprehensibility of its conduct – militates against the punitive damage award here. Most of Key's arguments concerning the reprehensibility of its conduct – or lack thereof – we reject without discussion. One aspect of Key's argument, however, merits discussion. Key argues that, in assessing the reprehensibility of its conduct, this court is obliged to ignore the fact that the jury assigned no fault to Edwards for his misdiagnosis of Bocci's condition. Key argues that, under *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674, 684 (2001), the court is to review the damage award "*de novo.*"[2] That is correct. The *Cooper Industries* decision, however, does not require a court reviewing a punitive damage award to reassess the basic facts found by a jury in support of the jury's determination of liability.

At issue in *Cooper Industries* was whether the appellate court had erred in reviewing a trial court's post-verdict punitive damage award decision for "abuse of discretion." 532 U.S. at ___, 121 S.Ct. at 1683, 149 L.Ed.2d at 684. The Court stated:

> "'The factual findings made by the [trial courts] in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous. * * * But the

[2] Key uses the term *de novo* in the sense that some federal courts use it, as referring to plenary review of legal questions. That use is different from the Oregon understanding of the phrase, as limited to review of factual determinations. *See Trabosh v. Washington County*, 140 Or.App. 159, 163 n. 6, 915 P.2d 1011 (1996).

> question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate.'"

Id. 532 U.S. at ___, 121 S.Ct. at 1685, 149 L.Ed.2d at 686-87 (citing and quoting *United States v. Bajakajian,* 524 U.S. 321, 336-37 n. 10, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998)) (ellipsis in original). The Court went on to analogize the "excessiveness" assessment of punitive damage awards to determinations such as "reasonable suspicion" and "probable cause," which are essentially legal determinations. *Id.* 532 U.S. at ___, 121 S.Ct. at 1685, 149 L.E.2d at 687. The Court concluded that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damage awards." *Id.* 532 U.S. at ___, 121 S.Ct. at 1685, 149 L.E.2d at 687. The Court went on to note that, unlike a determination of compensatory damages, the *amount* of a punitive damage award is not a "fact" that is "tried" by a jury. *Id.* 532 U.S. at ___, 121 S.Ct. at 1685, 149 L.E.2d at 687-88. The Court in no way suggested, however, that an appellate court reviewing a trial court's post-verdict punitive damages review (or, for that matter, a trial court reviewing a jury's punitive damage award) is obliged to second-guess the jury's basic liability determinations.

Nothing in *Cooper Industries* calls into question the "rational juror" standard of review announced by the Oregon Supreme Court in *Oberg.* Oregon appellate courts have never applied a deferential "abuse of discretion" standard of review to trial courts' post-trial determinations regarding punitive damages. *See MacCrone v. Edwards Center, Inc.,* 160 Or.App. 91, 105, 980 P.2d 1156 (1999),

vacated and rem'd 332 Or. 41, 22 P.3d 758, *adhered to on remand* 176 Or.App. 355, 31 P.3d 513 (2001). Although we do not defer to the trial court, we are not free to reduce or eliminate a punitive damage award based on a finding of culpability of a party that the jury determined was *not* culpable.

Finally, regarding the fourth factor, the disparity between the award and the actual or potential harm inflicted, *Parrott,* 331 Or. at 555, 17 P.3d 473, Key argues that the ratio of punitive damages to compensatory damages awarded to Edwards is excessive. As noted above, Key did not preserve this issue in the trial court but argued only that the *total* award to Bocci and Edwards was excessive.[3] Key argues that *Cooper Industries* compels us to reach the question of "the reasonableness of the punitive damage award in light of the disparity between the punitive award and the harm suffered by Edwards only." Nothing in *Cooper Industries* suggests that appellate courts are required to consider unpreserved issues. No error is apparent on the face of the record in this regard. We therefore decline to consider Key's unpreserved argument concerning the ratio of Edwards's punitive damage award to his compensatory damages.

Affirmed.

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[3] The ratio of the punitive damage awards to the compensatory damages awards was roughly ten to one.

974 P.2d 758

Court of Appeals of Oregon, In Banc.

Paul R. BOCCI, Jr., guardian ad litem for Paul R. Bocci, III, an incapacitated individual, Plaintiff,

v.

KEY PHARMACEUTICALS, INC., a foreign corporation, Schering-Plough Corporation, a foreign corporation, and Schering Corporation, a foreign corporation, Appellants,

and

Miles, Inc., an Indiana corporation, Miles, Inc., Pharmaceutical Division, an Indiana Corporation, Legacy Health System, an Oregon Corporation, Legacy Immediate Care Clinic, Frederick D. Edwards, M.D., and The Eugene Clinic, a partnership, Defendants. Frederick D. Edwards, M.D., Cross-Claim Plaintiff – Respondent,

v.

Key Pharmaceuticals, Inc., a foreign corporation, Schering-Plough Corporation, a foreign corporation, and Schering Corporation, a foreign corporation, Cross-Claim Defendants – Appellants.

A9210-07050; CA A86556.

Argued and Submitted June 16, 1997.
Resubmitted En Banc Dec. 9, 1998.
Decided Feb. 17, 1999.

William F. Gary, Eugene, argued the cause for appellants. With him on the briefs were Sharon A. Rudnick, James E. Mountain, Jr., and Harrang Long Gary Rudnick, P.C.

Mary Spillane argued the cause for respondent. On the brief were Margaret A. Sundberg, and Williams, Kastner & Gibbs LLP, and Daniel M. Holland, Ronald B. Terzenbach and Loomis & Holland.

Before DEITS, Chief Judge, WARREN, EDMONDS, LANDAU, HASELTON, ARMSTRONG and WOLLHEIM, Judges, and RIGGS, Judge pro tempore.

PER CURIAM.

Affirmed by an equally divided court.

RIGGS, J. pro tempore, concurring.

Defendant Key Pharmaceuticals, Inc. (Key)[1] appeals from a jury verdict in favor of defendant/cross-claim plaintiff Dr. Frederick Edwards (Edwards), that awarded a total of $23 million in compensatory and punitive damages. Key manufactures the prescription drug Theo-Dur, an asthma medication containing theophylline. This action was brought on behalf of Paul Bocci, III (Bocci), a long-time user of Theo-Dur, against Key for negligence and strict products liability after he suffered permanent brain damage as a result of theophylline toxicity. A claim was also brought against Edwards for medical malpractice for failing to diagnose and treat Bocci for theophylline toxicity. Edwards cross-claimed against Key for negligence and fraud, alleging that Key failed to advise physicians appropriately concerning theophylline toxicity caused by Theo-Dur. At trial, Bocci's claim against Edwards was

[1] Defendants also include the Schering-Plough Corporation and the Schering Corporation. Our references to defendant Key encompass those defendants as well.

dismissed, and the jury returned verdicts in favor of Bocci and Edwards against Key. After trial, Key settled with Bocci.[2] Key appeals from the judgment in favor of Edwards.

Because Edwards prevailed by jury verdict below, we state the facts in the light most favorable to him. *Baker v. English,* 324 Or. 585, 587, 932 P.2d 57 (1997).

The drug theophylline is a bronchodilator that has been used to treat asthma for many decades. Theophylline has a narrow therapeutic range: In order to prevent asthma symptoms, the serum levels of the drug in the blood generally must be at least 10 micrograms per milliliter (mcg/ml), but serum levels above 20 mcg/ml can be toxic. Saturation kinetics play a part in the way in which this drug may be metabolized; when the level of the drug in the body increases but the liver's ability to metabolize it does not increase, or when the amount of the drug entering the body stays the same but the liver's ability to metabolize it decreases for some reason, saturation can occur. This causes the serum levels of theophylline in the blood to increase. The ability of a body to metabolize theophylline may be affected by many things, such as smoking or the presence of a virus. Interactions between theophylline and other drugs may cause a body to metabolize theophylline at a slower rate, thus increasing the serum levels of theophylline in the blood and leading to theophylline toxicity. Theophylline toxicity can cause nausea,

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[2] The settlement occurred after the appeal was taken. Pursuant to ORS 19.410(3), this court has dismissed Bocci from the appeal, and no issues directly related to the verdict in favor of Bocci are addressed in this opinion.

vomiting, headaches, diarrhea, tachycardia, seizures, and death.

Before the 1970s, theophylline therapy was difficult because a great deal of monitoring and adjustment of dosage was necessary to keep stable the amount of the drug in a patient's blood at any given time. In the 1970s, Key introduced a new theophylline product, Theo-Dur, a timed-release capsule that it claimed had zero-order absorption. Zero-order absorption occurs when a drug is constantly absorbed by the system and eliminated at the same rate, thus keeping the serum levels of the drug in the blood stable. Key promoted Theo-Dur as being safer than other theophylline products; because of its zero-rate absorption, Key claimed, the risk of "toxic peaks" could be avoided. Key aggressively promoted Theo-Dur to physicians through sales representatives, journal advertising, and direct-mail campaigns. Promotional materials also urged patients, physicians and pharmacists not to accept generic or brand-name substitute theophylline products, as switching from Theo-Dur could cause "excessive toxicity." In 1987, the Food and Drug Administration (FDA) informed Key that it must cease claiming that Theo-Dur was superior to other theophylline products due to zero-order absorption, because the claim was not sufficiently supported by clinical data. In 1989, the FDA again found that Key was making false and misleading claims that Theo-Dur was superior to other theophylline products.

In October 1987, Key became aware of several medical journal articles reporting a drug interaction causing theophylline toxicity when both theophylline and ciprofloxacin, a newly available antibiotic often used to treat respiratory tract infections common among asthmatics, were administered. A Key internal memorandum dated

October 30, 1987, stated: "Ciprofloxacin produces a 30-113% decrease in theophylline clearance. These effects are significant enough to cause a patient that is stabilized on theophylline to potentially become toxic." In March 1988, Key proposed to the FDA that a warning be added to its Theo-Dur package insert concerning the interaction between theophylline and ciprofloxacin. Key's application for the labeling change, however, was not submitted in proper form, and it was not until March 1989 that the labeling change was approved. The labeling change was not reflected in the 1990 volume of the Physician's Desk Reference (PDR), although it was included in a May 1990 PDR supplement. Information such as a warning about theophylline-ciprofloxacin interaction is generally imparted to the medical community by drug manufacturers through "Dear Doctor" and "Dear Pharmacist" letters or statograms, through promotional materials sent to physicians, or through representatives of pharmaceutical companies (detailers) who call on physicians. The Code of Federal Regulations (CFR) allows for distribution of such warnings to physicians before revised labeling is approved by the FDA. The CFRs also allow a pharmaceutical company to change its labeling without preauthorization from the FDA in order to add warnings, precautions, or information concerning adverse reactions.

Between October 1987, when Key became aware of the theophylline-ciprofloxacin interaction, and Bocci's injury in October 1990, Key took no steps to inform physicians or patients of this potential toxicity problem, although it knew of several cases of serious toxicity and one death

caused by the interaction of theophylline and ciprofloxacin. During this period, Key continued to promote Theo-Dur as the only theophylline product that "protects against toxicity."

Bocci began taking Theo-Dur when he was seven years old. On October 21, 1990, when Bocci was 20 years old, he went to a medical clinic for treatment of a skin rash and was treated by Dr. Davis. Bocci indicated to Davis that he was not taking any medications, although he was taking 900 milligrams of Theo-Dur a day. Davis prescribed ciprofloxacin for the skin rash. Bocci took both ciprofloxacin and Theo-Dur from October 21 to October 26, 1990. On October 27, 1990, Bocci went to an urgent care clinic, The Eugene Clinic, with symptoms including nausea, vomiting and diarrhea. He was seen by Dr. Edwards. Edwards discovered that Bocci had been on a stable dose of Theo-Dur for a long time, and, although he considered a diagnosis of theophylline toxicity, he did not diagnose that condition. Edwards did not consult the PDR or the PDR supplement. Edwards did not think that a patient on a stable dose of Theo-Dur could experience severe theophylline toxicity that could lead to brain damage unless the patient had taken an overdose, because Theo-Dur had been marketed and promoted to him as a "safe" drug. The detailer who had promoted the drug to Edwards and the Eugene Clinic in 1989 and 1990 testified that he would tell physicians that Theo-Dur had zero-order absorption and that it was safe. Edwards testified that he did not make a connection between a patient on a stable dose of a safe drug such as Theo-Dur and a serious toxicity problem. He therefore diagnosed gastroenteritis, treated Bocci with antinausea medication and intravenous fluids, and then sent him home.

Several hours later, Bocci had violent seizures and was taken to a hospital emergency room. Anticonvulsant medications were administered but failed to control the seizures, and the physicians attending him had difficulty diagnosing the cause of the seizures. Late that evening, after learning that Bocci had been taking asthma medication, they tested for theophylline toxicity and discovered that Bocci's theophylline level was 63 mcg/ml, well into the toxic range. The theophylline was removed from Bocci's blood through dialysis and the seizures ceased. However, Bocci suffered permanent brain damage as a result of the seizures.

A number of physicians testified about their knowledge and understanding of Theo-Dur as of October 1990, when Bocci sustained his injury. Those physicians did not know about the theophylline-ciprofloxacin interaction and did not know that patients stabilized on standard doses of Theo-Dur could experience toxicity problems causing severe seizures such as those experienced by Bocci. Those physicians did not know that blood levels of theophylline should be obtained on patients using theophylline products if the patients experienced nausea and vomiting.

On Bocci's claims, the jury returned a verdict finding that Key was 65 percent at fault and Bocci was 35 percent at fault. On Edwards' cross-claims, the jury found that Key was negligent and that Key's negligence caused Edwards' damages and found that Key had made fraudulent misrepresentations to Edwards that caused him damage. The jury further found that Key caused 100 percent of Edwards' damages. The jury also found clear and convincing evidence that Key had acted with wanton disregard for the health and safety of others and had knowingly withheld from or misrepresented to the FDA or prescribing physicians

information known to be material and relevant to theophylline toxicity, in violation of applicable FDA regulations. The court entered a judgment in Bocci's favor including compensatory damages of $5,621,648.20[3] and punitive damages of $35 million, and in Edwards' favor for compensatory damages of $500,000 and $22.5 million in punitive damages. On appeal, the only issues before us concern the verdict and damage award in Edwards' favor.

Mary Carter Agreement

A number of Key's assignments of error relate to a "Covenant Not-to-Enforce-Judgment and Separate Loan Agreement" entered into by Bocci, Edwards, and Edwards' insurer. This type of agreement is commonly known as a "Mary Carter agreement," and we will use that term when discussing it.[4] Through this agreement, which contemplated a lawsuit by Bocci against Edwards and other defendants, Edwards guaranteed Bocci a minimum recovery of at least one million dollars and, at the same time,

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[3] This amount reflects the judge's 35 percent reduction of the jury's damage award, to take into account the 35 percent fault attributed to Bocci.

[4] The term "Mary Carter agreement" came from the case of *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla.Ct.App.1967), and generally refers to an "agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the non-agreeing defendant or defendants." *Grillo v. Burke's Paint Co.*, 275 Or. 421, 425 n. 1, 551 P.2d 449 (1976), *quoting* Note, *The Mary Carter Agreement – Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S Cal L Rev 1393, 1396 (1974).

limited any recovery against Edwards to one million dollars. The agreement contained the following terms: In consideration for $200,000, Bocci agreed not to enforce any judgment against Edwards based on the events of October 27, 1990; Edwards loaned Bocci an additional $800,000, the repayment of which depended on Bocci's recovery, if any, from other defendants. In the event that Bocci recovered against no other defendants, no repayment of the loan was required. In the event that Bocci recovered an amount in excess of $3 million from other defendants, full repayment of the $800,000 loan was required.[5] The existence of this agreement was known to Key before trial.

As an initial matter, we note that most of Key's arguments pertaining to the Mary Carter agreement focus on whether Edwards' participation in the case as a defendant allowed *Bocci* an unfair procedural advantage. As noted, see note 2, above, no issues relating to Bocci's recovery against Key are currently before this court, because Key settled with Bocci after the appeal was commenced. After careful review of the briefs, however, we conclude that Key's arguments concerning the Mary Carter agreement remain viable on appeal because, if Key is correct, the procedural advantages that it has identified relating to the Mary Carter agreement might indirectly have benefitted Edwards in his cross-claim as well as benefiting Bocci in his claim. Although Key's primary argument was that the Mary Carter agreement provided Edwards a motive to maximize Bocci's recovery against Key, as discussed below, other advantages relating to the

[5] Other provisions of the agreement provided for partial repayment of the loan under circumstances not relevant here.

way the case was presented to the jury, the way witnesses were examined, and similar matters, could have benefitted Edwards as well as Bocci.

Key asserts on appeal that the trial court erred in denying its pretrial motions concerning the Mary Carter agreement. Key argued in those motions that Edwards should be dismissed from the case because the agreement settled Bocci's claim against Edwards, or alternatively, that the agreement should be declared void or that Edwards should be realigned as a plaintiff rather than a defendant.

On appeal, Key argues that the Mary Carter agreement should have been declared void, as a violation of public policy. In *Grillo v. Burke's Paint Co.*, 275 Or. 421, 427, 551 P.2d 449 (1976), the court rejected the notion that Mary Carter agreements are *per se* invalid under Oregon law. Moreover, ORS 18.455, which recognizes covenants not to enforce judgments, demonstrates that Mary Carter agreements do not violate the public policy of Oregon. The trial court did not err in denying Key's motion to declare the agreement void on the basis of public policy.

Key next argues that Bocci's claim against Edwards should have been dismissed before trial on the ground that the Mary Carter agreement had fully settled those claims and, thus, no justiciable controversy existed between those parties. Key argues, in essence, that Bocci's claim against Edwards became moot when they entered into the Mary Carter agreement. We disagree. While the agreement had the effect of limiting Edwards' liability for Bocci's injury to an amount between $200,000 and one million dollars, it did not *establish* Edwards' liability. As the agreement itself states, one of its purposes was to permit Edwards to

establish that he was not liable for Bocci's injury, while limiting his financial exposure and allowing him an opportunity to cross-claim against Key. A justiciable controversy exists when "the interests of the parties to the action are adverse," and "the court's decision in the matter will have some practical effect on the rights of the parties to the controversy." *Brumnett v. PSRB,* 315 Or. 402, 405-06, 848 P.2d 1194 (1993). Bocci's and Edwards' interests were sufficiently adverse to survive the first prong of that test: Bocci asserted that Edwards was negligent, and Edwards asserted that he was not negligent. How much Edwards would pay Bocci depended on whether, or to what extent, the jury determined Edwards to be negligent. That both Bocci and Edwards had an interest in establishing that Key was at fault does not destroy that adversity. A decision would have "some practical effect," in that it would determine whether Edwards would pay Bocci $200,000, one million dollars, or some amount in between.

That conclusion is consistent with our holding in *Stephens v. Bohlman,* 138 Or.App. 381, 909 P.2d 208, *rev. allowed* 324 Or. 176, 922 P.2d 669 (1996). In *Stephens,* one of the defendants settled with the plaintiff for a flat sum, but agreed to remain in the case as a defendant. Distinguishing that kind of arrangement from a Mary Carter agreement, we concluded that no justiciable controversy existed between the plaintiff and the settling defendant because the settling defendant "had no interest in the outcome of the case against [the non-settling] defendant because it could neither gain nor lose anything as a result of the trial." *Id.* at 385, 909 P.2d 208. We distinguished the agreement in *Stephens* from the "true" Mary Carter agreement at issue in *Grillo,* noting that in *Grillo,* while "the settling defendant's interest in the case became adverse to

that of the other defendant, *the settling defendant clearly retained an interest in the outcome* " due to the repayment provisions of the agreement. *Id.* (emphasis added). This case involves a "true" Mary Carter agreement like the one at issue in *Grillo,* and not a settlement agreement of the type at issue in *Stephens.* The trial court properly denied Key's pretrial motion to dismiss Edwards as a defendant.

The dissent's position – that no justiciable controversy existed between Bocci and Edwards after they entered into the agreement – is untenable. 158 Or.App. at 556, 974 P.2d at 778 (Landau, J., dissenting). As an initial matter, neither defendants nor the dissent explain why the resolution of this question would justify overturning a verdict in Edwards' favor on an entirely different claim. In any event, were the dissent's analysis of this issue correct, it would lead to an inevitable conclusion that *Grillo* and *Stephens* were incorrectly decided. While the dissent narrowly frames the issue as whether the trial court in this case erred by failing to dismiss Edwards from the case, such a holding would have the much wider implication that no justiciable controversy ever exists between a plaintiff and a defendant who are parties to a Mary Carter agreement. Thus, if the dissent were correct, Mary Carter agreements would not be valid and enforceable under Oregon law, despite what we have said in *Stephens,* and despite what the Supreme Court has said in *Grillo.*

In any case, any error in failing to dismiss Edwards as a defendant before trial was not prejudicial. Bocci's claim against Edwards was dismissed before the case was submitted to the jury, and Edwards would have remained a party in any event due to his claim against Key. Defendants offer no explanation of why the trial court's failure to dismiss Bocci's claim against Edwards would justify

setting aside Edwards' verdict against Key, and we can think of none. *See Stephens,* 138 Or.App. at 386, 909 P.2d 208 (where settling defendant was dismissed before the case was submitted to the jury, error in failing to dismiss settling defendant before trial was harmless, given that the same evidence would have been admitted had that defendant been dismissed earlier).

Key argues alternatively that the trial court should have realigned Edwards as a plaintiff, citing authority from other jurisdictions. The gist of Key's argument is that Edwards' participation as a defendant created an unfair procedural advantage. Key notes that Edwards' testimony (unsurprisingly) indicated that Key's failure to warn, rather than Edwards' failure to diagnose, was the cause of Bocci's injuries, and further points out that Bocci's attorney did not cross-examine Edwards vigorously to try to establish that Edwards was negligent. Key implies that the jury was misled by this alignment of the parties, to Key's disadvantage.

Key's arguments would be equally applicable to any case in which a plaintiff enters into a covenant not to enforce a judgment with a defendant who remains party to a lawsuit. ORS 18.455, however, specifically recognizes the validity and enforceability of such covenants[6] and does not preclude defendants who enter into such agreements with plaintiffs from participating as defendants in a lawsuit. As to Key's argument that the jury was likely to be misled if

[6] ORS 18.455 was amended in 1995, after the trial in the present case. Both versions of this statute recognize the validity of covenants not to enforce judgments.

Edwards was not realigned as a plaintiff, we are unconvinced that juries are so naive as to assume that parties' interests in a civil case are defined solely by whether they are labeled "defendants" or "plaintiffs." Key had ample opportunity to – and in fact did – argue extensively to the jury about Edwards' and Bocci's mutual interest in verdicts against Key. Juries are regularly asked to make factual decisions concerning liability where numerous defendants are pointing fingers at each other in an effort to establish that they are not responsible for an injury. Juries are regularly asked to decide the merits of defendants' cross-claims against one another. Juries, when properly instructed, can assess the interests of the parties, whether those parties are labeled as plaintiffs or defendants.

That conclusion brings us to Key's next assignment of error, that the trial court abused its discretion in its instructions to the jury concerning the Mary Carter agreement. The trial court gave the jury the following preliminary instruction regarding the Mary Carter agreement:

> "I do need to inform you that settlement agreement has been reached between the plaintiff and Dr. Edwards. Dr. Edwards, nevertheless, remains a party to this lawsuit under the terms of the settlement agreement and he will be offering evidence that he was not negligent in his involvement in this case and he also has filed what we call a cross-claim. He is making a claim himself against Key Pharmaceuticals.
>
> "The settlement agreement contains a schedule for repayment, however, to Dr. Edwards by the plaintiff if the plaintiff is awarded a verdict against the defendant Key Pharmaceuticals

> Company. So there is that relationship that you need to be aware of, but the jury that is selected in this case is to consider the fact of the settlement only as it might bear on the issue of credibility or believability of the witnesses who testify, and it is not to be considered in any way in determining the amount of the verdict or damages, if any, that the jury should award at the end of the case."

Key argues on appeal that the jury instruction should have informed the jury of the specific terms of the agreement, so that it could have pointed out to the jury the covert cooperation between Edwards and Bocci. In the trial court, however, Key argued that the statement that Edwards remained in the case to establish that he was not negligent was "absolutely ludicrous," that Edwards had no financial stake in the outcome of the case, and that the reason Edwards was a party was "so that his insurance carrier can recoup some of the money that they have agreed to pay towards the million dollar guarantee."[7] We consider only the arguments that Key adequately preserved in the trial court. ORAP 5.45.

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[7] The court later gave the jury a more complete instruction concerning the Mary Carter agreement, explaining that Bocci's recovery against Edwards would be reduced depending on how much Bocci might recover from Key. The instruction correctly explained how the Mary Carter agreement functioned, but did not reveal the amounts of money involved, or that Edwards' insurer was a party to the agreement. Key has assigned error to that instruction as well, but the only argument Key has made concerning that instruction is that the instruction was "too little, too late." Key offers no specific argument about what it thinks was omitted from this instruction, or how it might have been legally incorrect. We therefore do not consider that assignment of error. ORAP 5.45.

Key sought to have the court instruct the jury that Edwards had no financial stake in the outcome of Bocci's claim. As discussed above, Edwards had a financial stake in the outcome of that claim. Key sought to have the court inform the jury about Edwards' insurance coverage. Giving such an instruction would have been error, because "the injection of insurance into the trial of a case where it is irrelevant is ground for reversal." *Waterway Terminals v. P.S. Lord,* 242 Or. 1, 37, 406 P.2d 556 (1965). *See also* OEC 411 (limits on admissibility of evidence concerning liability insurance). Edwards' malpractice insurance situation had no independent relevance in this case and almost certainly would have been prejudicial to Edwards in the jury's deliberation of liability as between Bocci and Edwards. The court did not err in giving the preliminary instruction quoted above. The instruction gave a general overview of the Mary Carter agreement that accurately, if briefly, summarized the document. Particularly in the light of the fact that Key does not point to any specific error in the trial court's later, more in-depth instruction concerning the Mary Carter agreement, see note 7 above, we are unable to see how the court erred in giving the preliminary instruction.

Key next argues that the trial court erred in limiting what it could say about the Mary Carter agreement during its opening statement. Key makes no specific arguments concerning this assignment of error, and it is unclear from the excerpt of the record provided by Key exactly what Key wished to tell the jury about the agreement, except that the agreement "created a fund for litigation." However, the real problem with Key's argument is that this issue was raised before trial, and the court did not make a ruling on what Key could or could not tell the jury during opening

argument. Key's counsel asked for guidance as to what he could say about the agreement, and the court stated that "for the moment, I don't have an answer to your question," although the court did suggest that counsel should not go into too much detail about the Mary Carter agreement in its opening. Trial courts have a great deal of discretion to control how parties make their arguments. *See generally Troutman v. Erlandson,* 279 Or. 595, 605, 569 P.2d 575 (1977). The trial court's suggestion to Key's attorney that he should not go into too much detail about the agreement during opening arguments was not an abuse of discretion, in light of the court's substantive decision about the admissibility of the terms of the agreement, discussed below.

Key's central argument concerning the Mary Carter agreement is that the trial court erred in refusing to allow Key to introduce the agreement itself into evidence. In *Grillo,* 275 Or. at 427, 551 P.2d 449, the court stated that such agreements are valid and enforceable, but went on to note that the agreement in that case "would have been subject to pretrial discovery and, upon request of defendant, would have been admissible into evidence." Key relies on that statement in support of its contention that the trial court was required to admit the agreement into evidence, rather than simply to describe the relevant portions of the agreement to the jury.

The trial court did not ignore the above-quoted statement from the *Grillo* case. Rather, the court recognized that tension existed between that *dictum* from *Grillo* and a more recent case, *Holger v. Irish,* 316 Or. 402, 851 P.2d 1122 (1993). In *Grillo,* the plaintiff and a defendant entered into a Mary Carter agreement that was similar in

substance to the one at issue here. The nonsettling defendant, however, did not discover the existence of the agreement until after the trial.[8] The question in *Grillo* was whether the defendant was entitled to a new trial based on newly discovered evidence. 275 Or. at 423, 551 P.2d 449. The court concluded that the defendant was not entitled to a new trial because, although it did not know specifically of the Mary Carter agreement, it knew that the other defendant, who was a party to that agreement, intended to settle with the plaintiff, and in fact knew that the defendant had advanced money to the plaintiff. *Id.* at 427-28, 551 P.2d 449. Thus, the court concluded that the defendant who was not party to the agreement had not exercised due diligence and was not entitled to a new trial. *Id.* at 429, 551 P.2d 449. *Holger,* by contrast, concerned the propriety of informing a jury about a plaintiff's settlement with a defendant that had resulted in the dismissal of that defendant from the case before trial. The trial court told the jury of the settlement, on the ground that the jury would "wonder why the [settling defendant was] not involved in the case." *Holger,* 316 Or. at 413, 851 P.2d 1122. The Supreme Court held that telling the jury of the settlement was error, because "in the usual case, it is not proper to inform the jury concerning a plaintiff's remedies or potential remedies against persons who are not parties in the dispute that the jury is to decide, unless that information has independent relevance." *Id.* at 414, 851 P.2d 1122.

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[8] Those events occurred before the effective date of ORS 18.455, which requires the disclosure of such an agreement to other defendants.

We agree with the trial court that some tension exists between *Grillo* and *Holger. Grillo* declares, albeit in *dictum*, that a Mary Carter agreement would have been admissible into evidence. *Holger* indicates that a jury generally should not be informed of settlements unless the information has independent relevance. The trial court attempted to accommodate those competing interests by allowing the jury to know as much about the Mary Carter agreement as had "independent relevance." *See also* OEC 408, 411 (evidence concerning settlements and liability insurance not admissible to demonstrate liability but may be admissible for other purposes, such as proving bias or prejudice of a witness). We agree with the trial court that the *dictum* in *Grillo* should not be read expansively to mean that irrelevant or prejudicial material contained in a Mary Carter agreement always must be admitted into evidence. The more reasonable reading of *Grillo,* and a reading that is easily reconcilable with *Holger,* is that the existence and terms of a Mary Carter agreement may be relevant, but that the agreement's admissibility is subject to the strictures otherwise placed on relevant evidence.

Although on appeal Key appears to be arguing that the entire agreement should have been admitted into evidence, in the trial court Key argued that the agreement should be admitted into evidence in a redacted form, deleting portions that Key believed were "self-serving," *i.e.,* recitals that Bocci and Edwards agreed that Key failed to reasonably warn physicians concerning Theo-Dur's toxicity, that Edwards and Bocci agreed that Key was primarily responsible for Bocci's injury, and that Edwards was not admitting any liability by entering into the agreement. Key did not, however, propose to redact the information concerning Edwards' liability insurance from

the agreement. As noted above, admission of evidence pertaining to Edwards' liability insurance would have been error. Key argues on appeal that Bocci and Edwards had the "burden to object to the portions containing inadmissible evidence such as the amount of the settlement and insurance." That is incorrect. Where a party attacks the exclusion of an exhibit that contains some irrelevant material, that party has "the burden of excising the irrelevant portions of the exhibit to preserve the claimed error." *Fazzolari v. Portland School Dist. No. 1J,* 78 Or.App. 608, 614, 717 P.2d 1210 (1986), *aff'd. on other grounds* 306 Or. 1, 760 P.2d 1317 (1988). *See also State v. Thomas,* 149 Or.App. 557, 561, 945 P.2d 1056 (1997) (if any part of an offer of proof was properly excluded, there is no reversible error); *Smith v. White,* 231 Or. 425, 435, 372 P.2d 483 (1962) ("Where there is a single offer of proof which includes matter that is objectionable, the entire offer may be rejected."). Given the nature of Key's offer of proof, the trial court did not err in failing to admit the Mary Carter agreement, as redacted by Key, into evidence.

Key also argues that the trial court erred in limiting its cross- examination of Edwards about the Mary Carter agreement. On cross-examination, counsel for Key asked Edwards whether, in view of the Mary Carter agreement, he had any financial exposure in this case. Edwards replied that he did. Despite that answer, Key's counsel asked: "And you do not have such exposure in this case, at all, do you, sir?" The court sustained the objection to that question. Key's counsel then asked the court if he could "explore that," and the court said that he could not. On appeal, Key argues that the extent of Edwards' financial exposure under the Mary Carter agreement was relevant to demonstrate Edwards' bias. Because Key did not make

an offer of proof concerning that issue, we are able to infer from the record only that Key was not allowed to bring out on cross-examination the actual amount of the settlement and loan as set forth in the Mary Carter agreement, and Edwards' insurer's participation in the agreement.[9]

> OEC 609 provides, in part: "(1) The credibility of a witness may be attacked by evidence that the witness engaged in conduct or made statements showing bias or interest. * * *
>
> "(2) If a witness fully admits the facts claimed to show the bias or interest of the witness, additional evidence of that bias or interest shall not be admitted. * * *"

Impeachment for bias or interest may be appropriate in a situation such as this, where Edwards not only had an interest in proving his own claim against Key, but the Mary Carter agreement gave him an interest in maximizing Bocci's recovery against Key as well. However, for several reasons, we reject Key's arguments that the trial court committed reversible error by limiting the cross-examination of Edwards.

A court has discretion to limit the cross-examination of a witness for bias, particularly in situations in which the information sought would be prejudicial. The information Key sought from Edwards on cross-examination

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[9] Key also argues on appeal that it could have used the agreement to impeach Edwards' testimony that he was tearful after he was served with the lawsuit. Because it is not clear from the agreement how it would have impeached Edwards on that point, and because Key made no offer of proof, we do not consider that argument to be sufficiently preserved for appellate review.

apparently was the exact amount that Edwards' malpractice insurer would pay should Bocci recover particular sums from Key. The potential for prejudice was significant because the information Key was trying to elicit could have distracted or confused the jury, which had been properly instructed not to consider that settlement when determining damages. Moreover, Key makes no argument that the insurance information was relevant to demonstrating Edwards' bias. *Cf. Holger,* 316 Or. at 415, 851 P.2d 1122 (even a legally correct instruction concerning the effect of settlement could be error if it could distract jury from appropriate analysis); *Johnson v. Hansen,* 237 Or. 1, 4, 389 P.2d 330 (1964) ("In the ordinary case, the presence or absence of insurance is not only irrelevant, but the unnecessary injection of the subject into the trial is prejudicial.").

The need for evidence demonstrating bias must be weighed against the danger of unfair prejudice. OEC 403. Key has failed to articulate how the cross-examination it wished to undertake would have demonstrated further bias than was already apparent from the nature of the Mary Carter agreement itself. Given the questions asked, it is clear that Key was attempting to show that Edwards' malpractice insurer, rather than Edwards himself, had the only financial exposure in the case. Key does not explain how that fact somehow made Edwards *more* biased against Key and in favor of Bocci than would have been the case if Edwards had no malpractice insurance. In fact, the opposite would be true: If Edwards rather than his insurer were potentially responsible for paying for the harm to Bocci, he would have all the more reason to be taking the position that Key caused Bocci's harm. Given the doubtful relevance of this evidence, the trial court did

not err in excluding the evidence in light of the danger of unfair prejudice.

For essentially the same reason, any error in failing to allow Key to pursue its cross-examination on this point undoubtedly was harmless error. As noted above, the jury knew of the existence of the Mary Carter agreement and knew that Bocci's recovery against Key could affect how much Edwards would pay Bocci. Aside from the fact that the information that Key was apparently trying to solicit did not demonstrate bias, any possible bias would relate to Bocci's claim; it would not relate to Edwards' own claim against Key. The existence of Edwards' claim against Key told the jury what it needed to know about Edwards' "bias" in this case, at least as it pertains to Edwards' own claims against Key which are the only claims at issue on appeal. To the extent that this evidence could be said to have any marginal relevance whatsoever, it would be relevant only to Edwards' bias in favor of Bocci's claims, not to Edwards' bias in favor of his own claims. Evidential error is not presumed to be prejudicial. OEC 103(1). We are unable to conclude that the trial court's limitation on Key's cross-examination of Edwards, if error at all, was reversible error as to Edwards' claim against Key.

The trial court did not err in limiting Key's cross-examination concerning the amount of the settlement and Edwards' malpractice insurer's participation in the Mary Carter agreement.

Jury Deliberations

After the verdict was received, the trial court notified the parties by letter that a copy of the current issue of *Prevention* magazine was found in the jury room and that

it contained an article entitled "Get Off the Asthma Tightrope." The author of that article advocated asthma control via inhaled steroids as safer than oral medications such as theophylline. The article did not discuss Theo-Dur or drug interactions. Key moved to have the court recall the jurors and examine each one under oath concerning that magazine. The court denied Key's motion, as well as Key's motion to set aside the verdict and motion for a new trial. The trial court held that Key had failed to make an adequate showing of juror misconduct. The court found that, even if one or more of the jurors had read the article in question, no misconduct had occurred, and there was nothing in the article that was pivotal to a fair resolution of the case: "The *Prevention* article could not possibly have affected the outcome of the case."

On appeal, Key argues that the trial court abused its discretion in refusing to recall the jury to interrogate them about the magazine and in denying its motion for a new trial. For the following reasons, we disagree that the court abused its discretion.

UTCR 3.120 provides, in part:

> "(2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:
>
> " * * *
>
> "(b) there is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment."

"There is a strong policy in Oregon to protect jury verdicts from attack, and courts are hesitant to interrogate jurors after they have reached a verdict in order to probe for potential misconduct." *Koennecke v. State of Oregon,* 122 Or. App. 100, 103, 857 P.2d 148 (1993). *See also Ertsgaard v. Beard,* 310 Or. 486, 498, 800 P.2d 759 (1990) (same). In the present case, not only is there no evidence of actual jury misconduct, but there is virtually no potential for misconduct. The jurors were not instructed to avoid bringing reading materials into the jury room and were not forbidden to read articles such as an article on asthma in the current issue of a popular magazine. The court did not abuse its discretion in denying Key's motion to interrogate the jurors.

The same is true for the court's denial of Key's motion for a new trial. "Only the clearest kind of juror misconduct can trigger the trial court's right to exercise its discretion and order a new trial." *Ertsgaard,* 310 Or. at 497, 800 P.2d 759. A comparison of the present case and *Ertsgaard* is instructive. In *Ertsgaard,* a malpractice action, juror Barrett stated during *voir dire* that she had been treated by defendant Dr. Allen, that she had stopped seeing Allen due to a change in insurance, and that she could be objective in deciding the case. *Id.* at 490, 800 P.2d 759. After trial, several other jurors complained that Barrett had stated that Allen had saved her niece's life, and had stated that finding the doctor negligent would ruin the doctor's reputation. *Id.* at 492-93, 800 P.2d 759. The Oregon Supreme Court found that the trial court had abused its discretion in granting a new trial under those circumstances:

> "In the relatively few cases in which this court has either permitted or required a new trial for

> juror misconduct that occurred during the deliberating process, we have found none in which the misconduct consisted solely of juror argument. All the cases have involved specific acts by jurors designed (and later claimed, either explicitly or implicitly) by the particular offending jurors to give them special knowledge concerning one of the disputed facts in the case then under consideration. *See, e.g., Sanders v. Curry County,* 253 Or. 578, 456 P.2d 493 (1969) (unauthorized inspection of premises); *Wolfe v. Union Pacific R. Co.* [230 Or. 119, 368 P.2d 622 (1962)] (unauthorized visit to accident scene); *Thomas v. Dad's Root Beer, Etc.,* 225 Or. 166, 356 P.2d 418, 357 P.2d 418 (1960) (view of accident scene and unauthorized experiment); *Eckel v. Breeze,* 221 Or. 572, 577, 352 P.2d 460 (1960) (view of scene); *Schneider v. Moe,* 151 Or. 353, 50 P.2d 577 (1935) (view of accident scene). Barrett's actions were different. She did not obtain new information relating to Allen's care for the plaintiff child. She simply disclosed the basis of her pre-existing bias. That is argument, not superior knowledge of a pivotal fact concerning some issue in the case actually being decided by the jury." *Id.* at 497-98, 800 P.2d 759.

The present case presents significantly fewer reasons for granting a new trial. In *Ertsgaard,* the court recognized that juror Barrett's remarks were inappropriate, and "of doubtful merit." *Id.* at 497, 800 P.2d 759. Here, all that can be said is that a juror may have carried a current issue of a popular magazine into the jury room. No misconduct has been demonstrated. The magazine contained an article by a doctor who advocated treating asthma by careful monitoring of breath flow and the use of inhaled steroids. That article, even if read by any of the jurors,

could not have provided "superior knowledge of a pivotal fact concerning some issue in the case actually being decided by the jury." *Id.* at 498, 800 P.2d 759. The trial court did not abuse its discretion in denying a new trial.[10]

Motion for Directed Verdict

Key next argues that the trial court erred in failing to direct a verdict in its favor on Edwards' negligence and fraud cross-claims. We consider only those arguments that Key preserved in the trial court and presented properly on appeal. ORAP 5.45.[11]

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[10] Key bases its arguments in significant part on its premise that Oregon courts have effectively adopted the standard set forth in Federal Rule of Evidence 606(b) that allows jurors to "testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." As the Oregon Supreme Court noted in *Ertsgaard,* the legislature "did *not* adopt FRE 606(b), or any similar rule, apparently believing that Oregon case law adequately stated the circumstances under which a court may inquire into the validity of a jury's verdict." *Ertsgaard,* 310 Or. at 494, 800 P.2d 759 (emphasis added). Key's reliance on FRE 606(b) therefore is misplaced.

[11] Key's opening brief contained 25 assignments of error, a number of which were labeled "errors relating to plaintiff's [Bocci] claims." As noted, see note 2 above, Key has settled with Bocci. Key argues to this court that a number of the "errors relating to plaintiff's claims" are not moot, however, because some of the evidence presented by Bocci also supported Edwards' cross-claims. Be that as it may, Key chose to assign those errors as ones "relating to plaintiff's claims," not as relating to Edwards' claim. Because those assignments of error were not assigned against him, Edwards did not respond to them in his response brief. Moreover, Key's reply brief did not suggest in any way that those assignments of error pertained to Edwards. Whether or not those claims of error could have been assigned successfully against Edwards,

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Key acknowledges that, under *Oksenholt v. Lederle Labs.*, 294 Or. 213, 215, 656 P.2d 293 (1982), a physician can "maintain an action for misrepresentation and negligence against a prescription drug manufacturer that misrepresents information about its drug to the doctor[.]" In *Oksenholt,* the plaintiff, a physician, relied on information provided by the defendant drug manufacturer and prescribed a drug that caused a patient to go blind. Key seeks to distinguish *Oksenholt* on the ground that the physician in that case actually prescribed the drug involved, whereas Edwards did not prescribe Theo-Dur to Bocci. Nothing in *Oksenholt* indicates that such a distinction would defeat a physician's claim such as this, where the physician alleges that the manufacturer's negligence and fraud caused the physician to misdiagnose a condition caused by the manufacturer's drug.

Key further argues that the trial court erred in denying its motion for a directed verdict on the cross-claim because it satisfied its duty to warn and because Edwards failed to demonstrate causation. Key points out that Edwards did not prescribe the Theo-Dur and that he did not know that Bocci had been taking ciprofloxacin. Key therefore concludes that its failure to warn of the drug interaction had no causal connection to Bocci's injuries. We disagree. There is evidence that Edwards considered a diagnosis of theophylline toxicity when he examined Bocci. There also is evidence from which a jury could infer that the reason Edwards did not correctly diagnose Bocci's condition of theophylline toxicity is because he relied on

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we do not address them here, because Edwards was not given a reasonable opportunity to respond to them.

Key's representations that Theo- Dur was "safe" because it had "zero-order absorption." The trial court properly denied Key's motion for a directed verdict on Edwards' negligence cross-claim.

Concerning Edwards' fraud claim, Key asserts that, as a matter of law, Edwards had no right to rely on its representations about the safety of Theo- Dur, because Edwards had a duty to exercise his own professional judgment in the treatment of his patients. The only case on which Key relies for its assertion is *McEwen v. Ortho Pharmaceutical,* 270 Or. 375, 528 P.2d 522 (1974). *McEwen,* however, leads to the opposite conclusion. In *McEwen,* the plaintiff sued the manufacturers of oral contraceptives that caused blindness. The drug manufacturers had a duty to warn prescribing and treating physicians of dangerous side effects produced by the drugs. "The warning should be sufficient to apprise the general practitioner as well as the unusually sophisticated medical man of the dangerous propensities of the drug. * * * In short, it is incumbent upon the manufacturer to bring the warning home to the doctor." *Id.* at 388, 528 P.2d 522 (citations and internal quotation marks omitted). While *McEwen* involved neither a claim by a physician against a pharmaceutical company nor a claim for fraud, its rationale supports Edwards' position that Key violated its duty to warn physicians adequately about the dangerous propensities of Theo-Dur. *McEwen* does not support Key's contention that the trial court should have granted its motion for a directed verdict on Edwards' claims.

Damages

Key assigns as error the trial court's decision to allow Edwards to amend his complaint at trial to increase his prayer for punitive damages. We review a trial court's decision to permit amendments to pleadings for abuse of discretion. Key asserts that the trial court abused its discretion in allowing the amendment.[12] The motion to amend was based on evidence discovered on the first day of trial, *i.e.,* a notice of adverse findings from the FDA, indicating that Key "has disseminated false and misleading labeling" for Theo-Dur. That evidence had been sought earlier through discovery but was not produced until trial. Motions for leave to amend are to be "freely given when justice so requires." ORCP 23 A. A court has "ample discretionary authority to allow amendments, provided the proffered amendment does not substantially change the cause of action or interject an entire new element of damage." *Cutsforth v. Kinzua Corp.,* 267 Or. 423, 433, 517 P.2d 640 (1973) (citation omitted). Edwards already had prayed for punitive damages, and the amendment merely modified the amounts prayed for. The trial court did not abuse its discretion by allowing the amendment.

Key also assigns error to the trial court's admission of the FDA notice of adverse findings mentioned above, on the ground that it is not relevant. We reject Key's argument without discussion.

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[12] Key argues for the first time on appeal that allowing Edwards to amend his complaint violated the Due Process Clause of the Fourteenth Amendment. Because that argument was not made to the trial court, we do not consider it. ORAP 5.45.

Key next argues that the trial court should have dismissed Edwards' punitive damages claim on the ground that Edwards failed to present sufficient evidence to create a jury question as to whether punitive damages were recoverable in this case.

ORS 30.927 provides:

> "(1) Where a drug allegedly caused the plaintiff harm, the manufacturer of the drug shall not be liable for punitive damages if the drug product alleged to have caused the harm:
>
> > "(a) Was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the Federal Food and Drug Administration under the Federal Food, Drug and Cosmetic Act of the Public Health Service Act; or
> >
> > "(b) Is generally recognized as safe and effective pursuant to conditions established by the Federal Food and Drug administration and applicable regulations, including packaging and labeling regulations.
>
> "(2) Subsection (1) of this section does not apply if the plaintiff proves [by clear and convincing evidence] that the defendant, either before or after making the drug available for public use, knowingly in violation of applicable Federal Food and Drug Administration regulations withheld from or misrepresented to the agency or prescribing physician information known to be material and relevant to the harm which the plaintiff allegedly suffered."

Key argues that Edwards failed to prove that it had withheld from or misrepresented to the FDA information that was known to be material and relevant to the harms Bocci and Edwards suffered.[13] As noted above, an FDA notice that Key "has disseminated false and misleading labeling" for Theo-Dur, was introduced into evidence. An FDA finding that Theo-Dur's labeling was misleading, particularly considered in conjunction with the evidence concerning what Key knew about theophylline toxicity, is sufficient to create a jury question as to whether Key "knowingly in violation of applicable Federal Food and Drug Administration regulations withheld from or misrepresented to the agency * * * information known to be material and relevant to the harm which the plaintiff allegedly suffered." ORS 30.927(2). Nonetheless, Key argues that the information in question – its false claims concerning zero-order absorption – were not "material and relevant to the harm which plaintiff allegedly suffered," because Bocci's harm was caused by a theophylline-ciprofloxacin interaction of which Edwards was not aware. We reject Key's argument. Bocci's and Edwards' harms were caused by Edwards' failure to diagnose theophylline toxicity, which in turn was caused by Key's promotion of Theo-Dur as a "safe" drug with "zero-order absorption." That type of promotion of Theo-Dur was the subject of the FDA letter of adverse findings. The trial court did not err in allowing this issue to be decided by the jury.

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[13] The parties have proceeded under the assumption that ORS 36.927 applies equally and in the same way to both Bocci's and Edwards' claims for punitive damages, and we accept that assumption for purposes of this appeal.

Key also asserts that the jury should not have been permitted to consider punitive damages pursuant to ORS 30.927(2), because Edwards was not the "prescribing physician." We need not address whether the legislature intended the term "prescribing physician" to cover physicians in the position of Edwards, *i.e.*, those who treat patients who are taking drugs prescribed by other physicians, because, as noted above, the jury found clear and convincing evidence that Key had withheld relevant information from the FDA. Edwards was not required to prove *both* that the FDA had been misled *and* that a "prescribing physician" had been misled. Proof on the FDA question was sufficient for purposes of ORS 30.927(2).

Key next argues that the punitive damage award in this case violates the Due Process Clause of the Fourteenth Amendment under the standard set forth by the United States Supreme Court in *Honda Motor Co. v. Oberg,* 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1995), and *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). Key first argues that ORS 30.925, ORS 30.927, and the Oregon Supreme Court's decision on remand in *Oberg* do not provide sufficiently specific standards by which the propriety of a jury punitive damage award may be reviewed.[14] We reject Key's argument for several reasons.

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[14] ORS 30.925 provides:

"(1) In a product liability civil action, punitive damages shall not be recoverable except as provided in ORS 18.537.

"(2) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

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In its post-trial motion for remittitur, Key argued that the trial court's "review of the punitive damage awards should be guided by the criteria in ORS 30.925, which resemble those in *Haslip*[.]" Under *Oberg,* courts review the jury's punitive damage awards to determine if they are "within the range that a rational juror would be entitled to award in the light of the record as a whole," depending on the "statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue." *Oberg v. Honda Motor Co.,* 320 Or. 544, 549, 888 P.2d 8 (1995).

On appeal, Key contends that judicial review in the light of statutory and common law factors pertaining to punitive damages may satisfy due process in some cases, but in other cases it will not. However, Key does not suggest anything that a reviewing court should review for *other than* statutory and common law factors, and we are

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"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

"(b) The degree of the defendant's awareness of that likelihood;

"(c) The profitability of the defendant's misconduct; "(d) The duration of the misconduct and any concealment of it;

"(e) The attitude and conduct of the defendant upon discovery of the misconduct;

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

unable to discern any other factors that the United States Supreme Court has deemed to be required in order to satisfy due process. *See Honda Motor Co.*, 512 U.S. at 440, 114 S.Ct. at 2345, 129 L.Ed.2d at 343-50 discussing factors relevant to review of punitive damage awards). *Haslip*, 499 U.S. at 20-22, 111 S.Ct. 1032 (same). Given that Key urged the trial court to review the jury's punitive damage awards to both Bocci and Edwards based on the statutory factors set forth in ORS 30.925, Key's position on appeal is untenable. Key argues for the first time on appeal that the trial court erred in failing to review the punitive damage award to Edwards independently of the punitive damage award to Bocci, because the statutory criteria from ORS 30.925 apply to strict liability punitive damage awards, and Edwards' claims involved negligence and fraud. Not only did Key fail to preserve this issue in the trial court, but it waived any argument on this point by specifically requesting the court to review the punitive damage awards in their entirety under the criteria listed in ORS 30.925.

Finally, Key argues that the trial court erred in denying its post-verdict motion for remittitur or a new trial on the ground that the punitive damage award was unconstitutionally excessive. As noted above, Key asked the court to review the punitive damages in the light of the factors listed in ORS 30.925, arguing that the jury improperly relied exclusively on one of those factors – the financial condition of the defendant – and that the large compensatory damage awards satisfied the goal of deterrence. Key argues that the punitive damage award was unconstitutionally excessive because it bears no relationship to Key's culpability as compared with Edwards' culpability. Key points out that Edwards failed to diagnose

Bocci's theophylline toxicity. That fact does not assist Key here. The jury found that Edwards was not at fault for failing to diagnose theophylline toxicity under the circumstances. The primary focus of punitive damages in this context is the misconduct of the defendant against whom those damages are being assessed. We reject Key's argument that the punitive damage award was unconstitutionally excessive because Edwards was somehow culpable despite the jury's explicit conclusion otherwise.

Judgment in favor of cross-claim plaintiff – respondent is affirmed.

HASELTON, ARMSTRONG and WOLLHEIM, JJ., join in this concurring opinion.

EDMONDS, J., dissenting.

I disagree with Landau, J., that the trial court should have dismissed Edwards from the case and should have admitted the redacted agreement into evidence. However, I agree with him that the trial court should have permitted cross- examination of Edwards concerning the nature of the agreement, so that the jury could understand the extent of Edwards' bias and interest. That error substantially prejudiced Key, in my view, and justifies reversal. For that reason, I dissent.

LANDAU, J., dissenting.

The trial court erred in resolving the parties' disputes about the Mary Carter agreement in three respects. First, the trial court should have dismissed Edwards from the case, as the settlement rendered plaintiff's claims against him nonjusticiable. Maintaining Edwards in the case distorted the very nature of the trial and substantially prejudiced Key Pharmaceuticals, Inc. (Key) in the process.

Second, the trial court should have admitted the redacted agreement itself to inform the jury that Edwards – nominally a defendant – actually had every interest in seeing plaintiff prevail against Key. Third, at the very least, the trial court should have permitted cross-examination of Edwards concerning the nature of the agreement, so that the jury could understand the extent of his bias and interest. The concurrence reaches a contrary conclusion with respect to each of those three matters. I disagree and, on those bases, respectfully dissent.

Before trial, plaintiff, Edwards and Edwards's insurer entered into a "Covenant Not-to-Enforce-Judgment and Separate Loan Agreement." Under the terms of that agreement, Edwards agreed to pay plaintiff $200,000 up front and to loan plaintiff an additional $800,000. Plaintiff agreed not to enforce any judgment against Edwards arising out of the pending claims. He also agreed that, if he obtained judgment against Key in excess of $3 million, he would repay Edwards the $800,000 loan. If plaintiff recovered a smaller amount from Key, the agreement provided for a smaller return of the loaned amount. The agreement is, as the concurrence correctly observes, a typical Mary Carter agreement.

Mary Carter agreements are not new, having been a regular feature of the litigation landscape since at least the Florida appellate court decision from which the name was derived in 1967. *Booth v. Mary Carter Paint Company,* 202 So.2d 8 (Fla.Dist.Ct.App.1967).[1] They are, however,

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[1] Actually, such agreements date back further than that. In *Trampe v. Wisconsin Telephone Co.,* 214 Wis. 210, 252 N.W. 675, 678 (1934), an agreement that would today be labeled a Mary Carter

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quite controversial. From the beginning, they have been subject to criticism that they are champertous, that they mislead juries, promote unethical collusion, and create the potential for an allocation of a larger share of liability to less culpable – but deeper pocketed – defendants, thus frustrating the operation of equitable contribution rules. In particular, courts and commentators around the nation have expressed concern about the effect of Mary Carter agreements on the integrity of the adversarial process.[2]

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agreement was declared invalid more than 30 years before the *Mary Carter Paint Co.* decision.

In Arizona, such agreements are called "Gallagher" agreements, after *City of Tucson v. Gallagher,* 108 Ariz. 140, 493 P.2d 1197 (1972) (en banc). *See* Abigail Carson, Note, *Are Gallagher Covenants Unethical?: An Analysis Under the Code of Professional Responsibility,* 19 Ariz. L. Rev. 863 (1977); Charles W. Lowe, Comment, *Gallagher Covenants, Mary Carter Agreements, and Loan Receipt Agreements: Unsettling Contributions to Conflict Resolution,* 1977 Ariz. St. L.J. 117.

[2] A substantial number of commentators have criticized Mary Carter agreements on these and other grounds. *See, e.g.,* Robin Renee Green, Comment, *Mary Carter Agreements: The Unsolved Evidentiary Problems in Texas,* 40 Baylor L. Rev. 449 (1988); John E. Benedict, Note, *It's a Mistake to Tolerate the Mary Carter Agreement,* 87 Colum. L. Rev. 368 (1987); Richard Casner, Note, *Admission into Evidence of a Mary Carter Agreement from a Prior Trial is Harmful Error,* 18 Tex. Tech. L. Rev. 997 (1987); June F. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions,* 38 U. Fla. L. Rev. 521 (1986); Katherine Gay, Note, *Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems,* 36 Ark. L. Rev. 570 (1983); David R. Miller, Comment, *Mary Carter Agreements: Unfair and Unnecessary,* 32 SW. L.J. 779 (1978); Meriwether D. Williams, Comment, *Blending Mary Carter's Colors: A Tainted Covenant,* 12 Gonz. L. Rev. 266 (1977); John Edward Herndon, Jr., Note, *"Mary Carter" Limitation on Liability Agreements Between Adversary Parties: A Painted Lady Is Exposed,* 28 U. Miami L. Rev. 988 (1974); David Jonathan Grant, Note, *The Mary Carter Agreement – Solving the*

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Mary Carter agreements create the potential to distort the adversarial process in a number of ways, by virtue of their creation of a substantial incentive for the settling defendant to cooperate fully with the plaintiff to shift liability to the remaining defendants, all the while appearing to the jury as a codefendant. The Mary Carter defendant's cooperation with the plaintiff may take the form of contributing discovery materials to the plaintiff, cooperating during *voir dire* by using peremptory challenges allocated among the defendants for the benefit of the plaintiff, permitting the settling defendant to be subject to leading direct examination as if the witness were hostile to the plaintiff, providing the plaintiff with essentially two opportunities to cross-examine the defendants' witnesses, and permitting the plaintiff to reap the benefit of additional argument in support of his or her cause. After engaging in the support of the plaintiff's efforts, Mary Carter defendants often then will be dismissed from the case, further demonstrating the essentially sham nature of their participation in the trial.

Because of such problems, some courts have declared that Mary Carter agreements simply are void as against public policy. In *Elbaor v. Smith,* 845 S.W.2d 240, 250 (Tex.1992), for example, the Supreme Court of Texas held that such agreements are *per se* invalid:

> "Remedial measures cannot overcome nor sufficiently alleviate the malignant effects that Mary Carter agreements inflict upon our adversarial system. No persuasive public policy justifies

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Problems of Collusive Settlements in Joint Tort Actions, 47 S. Cal. L. Rev. 1393 (1974).

> them, and they are not legitimized simply because this practice may continue in the absence of these agreements. The Mary Carter agreement is simply an unwise and champertous device that has failed to achieve its intended purpose."

Id. at 249. The Nevada Supreme Court reached the same conclusion, but by the rationale that Mary Carter agreements are essentially champertous, because they permit a person not a party to the lawsuit to retain a financial interest in its outcome. *Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347, 351 (1971). *See also Dosdourian v. Carsten,* 624 So.2d 241, 243-46 (Fla.1993) ("We are convinced that the only effective way to eliminate the sinister influence of Mary Carter agreements is to outlaw their use."); *In re Guardianship of Babb,* 162 Ill.2d 153, 205 Ill.Dec. 78, 642 N.E.2d 1195, 1204-07 (1994) (Mary Carter agreements violate contribution statute); *Trampe,* 252 N.W. at 678 (undisclosed agreement "clearly imposed a fictitious suit upon the court" resulting "in the trial of issues which were not real").

Other courts have concluded that Mary Carter agreements are void unless the settling defendant is dismissed from the lawsuit or realigned as a plaintiff. The Oklahoma Supreme Court, for example, has held that:

> "If the agreement does not absolutely settle the conflict, but rather hinges on the amount of the verdict [against nonsettling defendants], the trial court should review the circumstances of the agreement and *either hold that portion of the agreement granting agreeing defendant an interest in a large plaintiff's verdict unenforceable as against public policy, or dismiss the agreeing defendant from the suit.* In no circumstances should

> a defendant who will profit from a large plaintiff's verdict be allowed to remain in the suit as an ostensible defendant."

Cox v. Kelsey-Hayes Co., 594 P.2d 354, 359 (Okla.1978) (emphasis in original).

Still others have held that, because of the potential for variation in the exact terms of Mary Carter agreements and in their effect on the litigation process, their validity must be examined on a case-by-case basis. The California Supreme Court's decision in *Abbott Ford, Inc. v. Superior Court,* 43 Cal.3d 858, 239 Cal.Rptr. 626, 741 P.2d 124, 132 (1987) (en banc) is illustrative:

> "[A] broad ruling on the inherent validity or invalidity of sliding scale agreements 'in general' is inappropriate because such agreements may have a variety of effects at different stages of the litigation process – discovery, settlement, trial or appeal. The potential problems posed by a particular provision in such an agreement may call for one remedy – e.g., disclosure of the agreement to the nonagreeing parties or to the jury – in one context, and another remedy – e.g., invalidation of a specific provision, or the agreement as a whole – in a different context. Thus, analysis requires close attention to the specific provisions of the agreement itself, the factual setting in which the agreement is entered into, and the agreement's effect on the particular aspect of the judicial process at issue."

A majority of those courts addressing the matter have held, guardedly, that Mary Carter agreements are not invalid *per se*. As the Maryland Court of Appeals observed, "Nearly every court which has considered the matter has recognized that agreements such as that in the case at bar

have a potential for skewing the posture of the trial[.]" *General Motors Corp. v. Lahocki,* 286 Md. 714, 410 A.2d 1039, 1046 (Md. 1980). In recognition of the distortive effects of the agreements, a majority of the courts hold that the agreements are subject to disclosure to the parties, to the court, and to the jury. *Bohna v. Hughes, Thorsness, Gantz, et al.,* 828 P.2d 745, 757 n. 30 (Alaska 1992) (juries should be informed when settlements change the normal interests of a party); *Sequoia Mfg. Co., Inc. v. Halec Const. Co.,* 117 Ariz. 11, 570 P.2d 782, 792-95 (Ariz.Ct.App.1977) (agreement must be disclosed to the court and remaining parties at the earliest opportunity; trial court has discretion to present the agreement to the jury); *Firestone Tire & Rubber Co. v. Little,* 276 Ark. 511, 639 S.W.2d 726, 728 (1982) (agreement must be disclosed to the nonagreeing party and may be admitted into evidence); *Gatto v. Walgreen Drug Company,* 61 Ill.2d 513, 337 N.E.2d 23, 29 (1975), *cert. den. sub. nom. Gatto, Administrator v. Calumet Flexicore Corp. et al.,* 425 U.S. 936, 96 S.Ct. 1669, 48 L.Ed.2d 178 (1976) (settlement agreement must be disclosed to the court and opposing parties; disclosure to the jury might protect the integrity of the proceedings); *Ratterree v. Bartlett,* 238 Kan. 11, 707 P.2d 1063, 1074-76 (1985) (agreement must be disclosed to court, and the general terms of the financial interest of a settling defendant in the outcome of the case should be disclosed to the jury); *Lahocki,* 410 A.2d at 1046-47 (agreement must be disclosed to the court and opposing parties and admitted into evidence, unless there is danger of self-serving statements, in which case a statement of the terms of the settlement must be presented to the jury); *Johnson v. Moberg,* 334 N.W.2d 411, 415 (Minn.1983) (agreement must be disclosed promptly to court and remaining parties); *Hegarty v. Campbell Soup Co.,* 214

Neb. 716, 335 N.W.2d 758, 765 (1983) (agreement must be disclosed upon proper motion and admitted into evidence); *Cox,* 594 P.2d at 360 (pretrial agreement must be disclosed, and trial court erred in not admitting at least part of agreement into evidence); *Hatfield v. Continental Imports, Inc.,* 530 Pa. 551, 610 A.2d 446, 451-52 (1992) (agreement or at least the existence of the reason for the potential bias must be conveyed to the jury); *Poston by Poston v. Barnes,* 294 S.C. 261, 363 S.E.2d 888, 890 (1987) (agreement must be disclosed to the jury); *Corn Exchange Bank v. Tri-State Livestock,* 368 N.W.2d 596, 600 (S.D. 1985) (if an agreeing defendant stands to gain financially from a plaintiff's verdict, jury must be informed of the contents of the agreement); *Slusher v. Ospital by Ospital,* 777 P.2d 437, 444 (Utah 1989) (agreement must be disclosed to court and parties, then court should disclose the existence and basic contents of agreement to jury, which may include admission of the agreement into evidence); *State ex rel Vapor Corp. v. Narick,* 173 W.Va. 770, 320 S.E.2d 345, 348 (1984) (agreement must be promptly disclosed to court and opposing counsel so that trial court can decide whether agreement is valid and determine what measures should be taken to insure that the nonsettling party will not be prejudiced).

Oregon stands with the majority. In *Grillo v. Burke's Paint Co.,* 275 Or. 421, 551 P.2d 449 (1976), the court acknowledged the criticisms of Mary Carter agreements in general – that they "distort[ ] the relationship between plaintiffs and defendants, resulting in a non-adversary and possibly collusive proceeding[.]" *Id.* at 426, 551 P.2d 449. The court also noted that

> "the majority of jurisdictions which have considered this question do not condemn the agreements as invalid per se but instead require that the agreements be subject to pretrial discovery procedure and be admissible into evidence on request of any non-settling defendant."

Id. After reviewing those decisions, the court expressly aligned itself with them and concluded that, although the Mary Carter agreement in that case was not *per se* invalid, "it would have been subject to pretrial discovery and, upon request of [the] defendant, would have been admissible in evidence." *Id.* at 427, 551 P.2d 449.

My point in setting forth a summary of the case law is this: It is well-nigh universally recognized that Mary Carter agreements are dangerous. Even in jurisdictions declining to rule on the validity of the agreements *per se,* courts are careful to explain that parties, the court, and jurors should be fully informed of the agreements to avoid the distorting effects that they commonly have upon the adversarial process.

With that in mind, I turn to the manner in which the agreement was handled in this case. There is no question that plaintiff informed Key of the existence of the Mary Carter agreement and provided Key with a copy of it. Key then moved to have the agreement itself admitted into evidence, citing *Grillo.* The trial court acknowledged *Grillo* and its holding that Mary Carter agreements are admissible upon request. The court nevertheless denied Key's motion on the ground that *Grillo* had been implicitly limited by a subsequent decision of the Oregon Supreme Court, *Holger v. Irish,* 316 Or. 402, 851 P.2d 1122 (1993). The trial court characterized the *Holger* decision as holding that, "unless there is an overriding or compelling

reason, the jury is not to be told that there has been a settlement." The trial court, however, did agree to deliver a preliminary statement to the jury pool very briefly summarizing the agreement as follows:

> "The settlement agreement contains a schedule for repayment, however, to Dr. Edwards by the plaintiff if the plaintiff is awarded a verdict against the defendant Key Pharmaceuticals Company. So there is that relationship that you need to be aware of, but the jury that is selected in this case is to consider the fact of the settlement only as it might bear on the issue of credibility or believability of the witnesses who testify, and it is not to be considered in any way in determining the amount of the verdict or damages, if any, that the jury should award at the end of the case."

Key also moved to dismiss Edwards from the case. According to Key, because of the settlement agreement, Edwards no longer stood in an adversarial relationship with respect to plaintiff, and plaintiff's claims against him were nonjusticiable. Key complained that, by virtue of his remaining in the case in the posture of a defendant, Edwards would prejudice its ability to obtain a fair trial, among other things, by unfairly consuming peremptory challenges ostensibly allocated to the defense, by permitting plaintiff to conduct direct examination of Edwards by leading questions as if he were a hostile witness, and by effectively awarding plaintiff the strategic advantage of having additional objections, argument, and cross-examination. The trial court denied the motions.

At trial, Edwards in fact participated as a "stealth plaintiff." He participated in jury *voir dire*,[3] opening statement and examination of witnesses ostensibly as a defendant, but in reality as a coplaintiff. For example, plaintiff was permitted to call Edwards as a "hostile" witness, and conducted the direct examination by extensive leading questions as to Edwards's own blamelessness and Key's culpability. When Key attempted to cross-examine Edwards about the true nature of his interest in the litigation, the trial court precluded Key from pursuing the matter. When Key asked Edwards if he had "exposure in this case, at all," the trial court sustained plaintiff's objection, commenting only: "There is financial exposure. Sustained." Key asked: "Can I explore that, your honor?" The trial court said, "No, you may not." Then, at the end of trial – and true to the pattern of Mary Carter cases – plaintiff voluntarily dismissed Edwards from the case. The trial court informed the jury only that:

> "[P]laintiff's claims against Dr. Edwards have been withdrawn and you are not to concern – you are not to concern yourself with any reasons about why the court has withdrawn those allegations."

In its instructions to the jury, the court ultimately gave a slightly more complete summary of the Mary Carter agreement:

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[3] At *voir dire*, the trial court allowed plaintiff two peremptory challenges, Edwards two peremptory challenges, and Key three. There was discussion of requiring Edwards and plaintiff to share peremptory challenges, but plaintiff complained that he didn't "want to be put in a position where we're having to confer with counsel for Dr. Edwards in front of the jury."

> "Under the terms of the agreement, defendants Dr. Edwards and the Clinic paid a certain amount of money to Plaintiff. In return, Plaintiff agreed not to enforce any judgment that might be entered in this lawsuit against Dr. Edwards or the Eugene Clinic.
>
> " * * *
>
> "All or none or a portion of the money paid by Dr. Edwards and the Clinic to Plaintiff will be repaid, depending upon the amount of any recovery that Plaintiff obtains from the non-agreeing defendants."

The first of the trial court's mistakes with respect to the Mary Carter agreement was its denial of Key's motion to dismiss plaintiff's claims against Edwards on the ground that they no longer presented a justiciable controversy. As the Supreme Court explained in *Brumnett v. PSRB,* 315 Or. 402, 405, 848 P.2d 1194 (1993), a justiciable controversy exists when "the interests of the parties to the action are adverse" *and* "the court's decision in the matter will have some practical effect on the rights of the parties to the controversy." In this case, Edwards and plaintiff settled their differences and completely realigned their interests. If plaintiff established at trial that Edwards was negligent, the percentage of fault that the jury assigned to Edwards would only lessen any recovery from Key. Thus, plaintiff's sole objective at trial was to establish Key's – not Edwards's – liability. Similarly, Edwards's only interest at trial was in establishing Key's liability, for if the jury awarded more than $3 million against Key, Edwards stood to reap the return of $800,000 from plaintiff. That this complete coincidence of interests existed is nowhere better illustrated than in plaintiff's direct examination of Edwards. Called as an adverse witness, Edwards was not

subjected to a single adverse question. The entire focus of the supposedly hostile examination was the culpability of Key, not of Edwards. The fact that plaintiff had no real interest in pursuing a verdict against Edwards – and, indeed, had every interest in preventing the jury from finding against Edwards and thus threatening the potential recovery from Key – is further borne out by the fact that, at the close of the evidence, plaintiff dismissed Edwards from the case.[4] Plaintiff and Edwards were not, in any sense of the term, adverse, and their alignment as plaintiff and defendant was completely illusory.

The concurrence insists that the case against Edwards was justiciable, because the complaint alleges that the parties are adverse and because a jury verdict against Edwards hypothetically could have affected his liability to plaintiff. As to the first assertion, the concurrence is simply incorrect. Parties cannot create adversity by declaration when there is none in reality. In *Oregon Medical Association v. Rawls,* 281 Or. 293, 295, 574 P.2d 1103 (1978), for example, the plaintiff and the defendant sought a declaratory judgment as to the constitutionality of a statute. The complaint listed the parties as adverse, but they took identical positions as to the constitutionality of the challenged law. On its own motion, the Supreme Court dismissed the appeal, because the parties, in fact,

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[4] Additional evidence of the identity of interests is Edwards's motion *in limine* requesting an order precluding any reference to advice he obtained from *plaintiff's* lawyers. According to Edwards, the "primary common interest" that he shared with plaintiff "in establishing liability to Plaintiff of the non-agreeing defendants" should have cloaked any conversations he had with plaintiff's lawyers with the protections of the attorney-client privilege.

were not adverse concerning the issue before the court. *Id.* at 299, 574 P.2d 1103.

As to the second assertion, the concurrence certainly is correct that it is hypothetically possible for a jury verdict against Edwards to have affected Edwards's ultimate liability to plaintiff. The jury – at least before Edwards was dismissed – conceivably could have awarded $3 million in damages but allocated some portion of fault to Edwards. In that event, the verdict against Key would have been insufficient to trigger plaintiff's obligation to return some or all of the $800,000 loan to Edwards. I think it is debatable whether such a hypothetical contingency is sufficient to satisfy the requirements of justiciability. Courts in other jurisdictions have questioned whether a case is justiciable when a Mary Carter agreement has determined the limits of the settling defendant's liability. *See, e.g., Shelby v. Keck,* 85 Wash.2d 911, 541 P.2d 365, 370 (1975) (en banc); *Schell v. Albrecht,* 65 Ill.App.3d 989, 22 Ill.Dec. 651, 383 N.E.2d 15, 17-19 (1978). The concurrence fairly relies on *dictum* in *Stephens v. Bohlman,* 138 Or.App. 381, 385, 909 P.2d 208, *rev. dismissed* 324 Or. 177, 925 P.2d 907 (1996), for a contrary conclusion. We do not have to resolve that matter, however, because the two requirements of justiciability are conjunctive. Thus, whether or not a jury verdict hypothetically could have affected Edwards's liability, the fact remains that plaintiff and Edwards were not adverse, and the justiciability of plaintiff's claims against Edwards fail on that ground alone.

The concurrence suggests that, even if the claims against Edwards were not justiciable, any error was harmless, because Edwards had asserted a cross-claim against Key and would have remained in the case in any

event. Of course, the concurrence glosses over the fact that it was Edwards's status as a named defendant that permitted him to maintain the cross-claim in the first place. Indeed, the Mary Carter agreement itself recites that one reason for the agreement was to allow Edwards to pursue a cross-claim against defendant. If plaintiff's claim against Edwards had been dismissed, as it should have been at the beginning of trial, then Edwards would have been required to file a separate claim against Key and then move for consolidation of the two separate actions. Whether the trial court would have granted such a motion is pure speculation, and such speculation cannot form the basis for establishing the justiciability of a controversy. *Brumnett,* 315 Or. at 406- 07, 848 P.2d 1194.

Aside from that, the concurrence misses the point as to the nature of the harm that flowed from failing to dismiss the claim against Edwards. The point is not that Edwards remained in the trial, but that he remained in the trial *as a defendant*, with all the advantageous consequences as to tactics, *voir dire*, witness examination, and argument that such alignment affords. To be sure, the harm that flowed from the misalignment of the parties is most clear with respect to plaintiff's case against Key. Plaintiff was allowed to try much of his case through Edwards, whose nominal status as a defendant conferred benefits on plaintiff that he otherwise would not have enjoyed. But that misalignment infected Edwards's cross-claim against Key, as well. The concurrence, in fact, concedes that the same procedural advantages that plaintiff obtained from the Mary Carter agreement inured to Edwards on his cross-claim. 158 Or.App. at 528, 974 P.2d at 763 (Riggs, J., concurring). In my view, the trial court should have dismissed plaintiff's claims against

Edwards at the beginning of trial, and I would reverse on that basis alone.

The trial court's second mistake with respect to the Mary Carter agreement was its failure to admit the agreement itself into evidence. Key asked that the agreement be admitted to show Edwards's bias and interest in the outcome, and for the purpose of impeachment on his claim damages for emotional distress arising out of the filing of plaintiff's lawsuit against him. Key contended that the Mary Carter agreement – which was negotiated before the filing of the lawsuit and which expressly advised Edwards that plaintiff would be filing claims against him – demonstrated Edwards's lack of credibility as to his emotional distress.

Grillo plainly requires the admission of the agreement itself. The Supreme Court clearly held that the agreement is "admissible in evidence." *Grillo,* 275 Or. at 427, 551 P.2d 449. A blenderized summary of such agreements is not something that may be admitted "in evidence." Nor is anything in *Holger* to the contrary. In that case, the Supreme Court said nothing about Mary Carter agreements or about its earlier decision in *Grillo*. The court held merely that, under OEC 408, "evidence of a compromise is not admissible *unless it is offered for a purpose having independent relevance*." *Holger,* 316 Or. at 414, 851 P.2d 1122 (emphasis added). Mary Carter agreements *always* are independently relevant, given the fact that they are direct evidence of the settling defendant's substantial interest in seeing the plaintiff prevail, notwithstanding that defendant's alignment as a nominal defendant. OEC 408, in fact, expressly provides that evidence of compromise or offers of compromise is admissible "when the evidence is offered for another purpose, such as proving

bias or prejudice of a witness." Thus, there is no "tension" between the two decisions, as the trial court and the concurrence suggest.

Even assuming, for the sake of argument, that a summary of the contents of a Mary Carter agreement could suffice under *Grillo,* the fact remains that the summary the court gave in this case was inadequate. Before trial, all that the court told the jury was that there was a settlement, which contained a "schedule of repayment * * * if the plaintiff is awarded a verdict against the defendant Key Pharmaceuticals Company," and that there was, as a result, a "relationship that you need to be aware of." I fail to see how that abbreviated – and inaccurate – summary provided the jury sufficient information about the nature of the terms of the agreement to enable it to appreciate fully the extent to which Edwards's interests were aligned with plaintiff's.

I note that not even the concurrence suggests that the preliminary instruction sufficed. The concurrence maintains that any deficiencies in the initial overview of the agreement were remedied by the court's more detailed, post-trial instruction to the jury. I respectfully disagree. To begin with, I find the trial court's subsequent instruction to the jury only slightly more detailed than the initial one. In any event, whatever the merits of the post-trial instruction, the point is that, at that juncture, the damage was done, and the instruction was pointless. The purpose of the majority rule to which the court in *Grillo* adhered is to provide the jury full disclosure of the true relationship of the parties *during the trial,* so that the jury can evaluate the evidence as it is offered in the light of the bias that the Mary Carter agreements typically reveal. In this case, by the time the court delivered the post-trial instruction on

which the majority relies, Edwards already had exercised his peremptories in *voir dire*, already had been subject to leading direct testimony in the guise of "hostile" examination by plaintiff, and already had been protected from cross-examination on the nature and extent of his bias in favor of plaintiff. The post-trial instruction was simply too little, too late.

The concurrence alternatively complains that, because the Mary Carter agreement contains references to Edwards's insurance carrier, it would have been improper for the trial court to have admitted the entire agreement into evidence. In my view, the observation is somewhat beside the point. No one raised that argument at trial[5] and – particularly given that the matter easily could have been remedied by redaction had plaintiff or Edwards raised the issue – I think it is inappropriate for us to dispose of Key's arguments on appeal on that ground. Aside from that, I think it is fairly debatable whether the mention of insurance in this context is so clearly inappropriate as the concurrence assumes. OEC 411(1) provides that evidence of liability insurance is not admissible "upon the issue whether the person acted negligently or otherwise wrongfully." That is not the purpose for which the Mary Carter

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[5] Before trial, Edwards moved for an order prohibiting any reference to liability insurance at trial. The trial court granted the motion. Key then asked whether the court's ruling applied to the Mary Carter agreement, the admissibility of which had not yet been determined. The court agreed with Key's suggestion that that matter should be taken up later, when the motions relating to the Mary Carter agreement were addressed directly. So far as I can tell, at no time did plaintiff or Edwards argue that the Mary Carter agreement should be redacted of any references to Edwards's insurance carrier.

agreement was offered. It was instead offered as evidence of bias and pecuniary interest in the outcome, and OEC 411(2) expressly permits evidence of insurance to show "bias, prejudice or motive of a witness."

In short, the Mary Carter agreement itself was admissible. It was relevant to the issue of Edwards's bias and interest. The trial court's sole justification for excluding the document – its reading of the *Holger* decision – was incorrect.

The trial court's final mistake concerning the Mary Carter agreement was its refusal to allow Key to cross-examine Edwards concerning his interest in seeing plaintiff prevail, notwithstanding his alignment as a codefendant and his direct examination as an ostensibly adverse witness. OEC 609-1 provides that "[t]he credibility of a witness may be attacked by evidence * * * showing bias or interest." Consistent with that rule is the familiar refrain in the case law that " '[i]t is always permissible to show the interest or bias of an adverse witness.' " *State v. Hubbard,* 297 Or. 789, 796, 688 P.2d 1311 (1984) (quoting *Clevenger v. Schallhorn,* 205 Or. 209, 215, 286 P.2d 651 (1955)). That is not to say that parties have unlimited leeway in establishing the bias or interest of adverse witnesses. As the Supreme Court explained in *Hubbard,* the trial courts have some discretion in limiting the extent of the inquiry. 297 Or. at 798, 688 P.2d 1311. That discretion itself, however, is subject to limits:

> "The discretion of the trial judge to exclude evidence relevant to bias or interest only obtains once sufficient facts have been established from which the jury may infer that bias or interest. Typically, this would require wide latitude be given to the cross-examiner to ask and receive

> answers to questions sufficient to demonstrate to the jury the nature of the bias or interest of the witness."

Id.

In this case, the trial court did not merely limit Key's inquiry into the evidence establishing the nature and extent of Edwards's bias. The court precluded such inquiry altogether. The transcript reveals the following colloquy:

> "Q. (by Mr. Garnier, for Key): Is it your view that by virtue of the agreement that you have entered into with the plaintiff in this case you have any financial exposure of the outcome of this case?
>
> "Mr. Holland (for Edwards): Your honor, I object. That flies in the face of the court's ruling.
>
> "The Court: Objection overruled.
>
> "A. You're asking if I have an understanding that I have financial exposure in this case?
>
> "Q. Yes, sir.
>
> "A. Yes, I do.
>
> "Q. And you do not have such exposure in this case at all, do you, sir?
>
> "Mr. Holland: I object.
>
> "The Court: Sustained. There is financial exposure. Sustained. "Mr. Garnier: Can I explore that, your honor?
>
> "The Court: No, you may not."

Thus, not a single question was permitted as to the *facts* revealing Edwards's bias in this case. Under OEC 609 and *Hubbard,* that was reversible error.

The concurrence concludes that the trial court did not abuse its discretion in ruling on the objections to the cross-examination of Edwards because it allowed Key at least some inquiry into the fact of Edwards's financial exposure. I disagree. The sole question that the court allowed Edwards to answer was whether he had an understanding as to whether he had any financial exposure in the case. I submit that permitting that single question as to Edwards's understanding of the consequences of his agreement is not what the Supreme Court had in mind in requiring "wide latitude * * * to ask and receive answers to questions sufficient to demonstrate to the jury the nature of the bias or interest of the witness." *Hubbard,* 297 Or. at 798, 688 P.2d 1311.

The concurrence contends that its review of the matter is hampered by Key's failure to make an offer of proof as to what exactly it intended to ask Edwards, and that the only arguably preserved contention is that Key should have been allowed to inquire about the amount of Edwards's financial stake in the outcome of the trial. It is true that Key did not make an offer of proof. But in the light of the record of this case, I find that no great impediment.

OEC 103(1)(b) provides that an offer of proof is unnecessary when "the substance of the evidence [sought to be admitted] was made known to the court by offer or was apparent from the context within which questions were asked." That is the case here. Key's arguments in support of its efforts to get the Mary Carter agreement before the jury

were voluminous in the extreme. Key raised the matter of admitting the agreement and permitting cross-examination on it before trial, during trial, and during cross-examination of Edwards. The parties actively debated the extent to which Key should be permitted to examine Edwards concerning his relationship to plaintiff in the light of the agreement, and the court acknowledged in its comments during the cross-examination of Edwards both the scope of Key's intended cross-examination and the fact that its prior ruling on the admissibility of the agreement "ties your hands pretty substantially in terms of cross examination." In *Davis v. O'Brien,* 320 Or. 729, 737, 891 P.2d 1307 (1995), the Supreme Court held that pretrial contentions may be sufficient to preserve an error for appeal where the contentions were "presented clearly to the initial tribunal" and the "parties are not taken by surprise, misled, or denied opportunities" to meet the contentions. In the light of the hundreds of pages of briefing and argument on the Mary Carter issues in this case, I find it impossible to believe that anyone was caught off guard as to Key's intentions concerning its cross-examination of Edwards.

Even assuming, for the sake of argument, that the only matter that Key preserved was whether it could inquire into the *amount* of Edwards's interests in the outcome of the case, I still conclude that the trial court erred in excluding the cross-examination. The amount of Edwards's interest is directly relevant to the nature and extent of his bias. Parties routinely are allowed to examine expert witnesses as to the amount of their compensation to establish their bias. *State v. Brown,* 299 Or. 143, 150, 699 P.2d 1122 (1985) (amount of expert witness fees relevant to show bias). *See also* Laird C. Kirkpatrick, *Oregon Evidence*

362 (3d ed 1996) ("Generally, the pecuniary interest of an expert witness and any bias of the expert in favor of the calling party can always be shown."). I can envision no good reason to treat other witnesses differently.

The concurrence attempts to bolster its assessment of the trial court's ruling by reference to OEC 403, reasoning that the trial court's decision represents a sound effort to exclude unduly prejudicial information that was only of "marginal value" in establishing Edwards's bias. To begin with, no party at trial or on appeal made an argument in support of the trial court under OEC 403. Aside from that, I disagree with the concurrence's evaluation of the amount of Edwards's direct pecuniary interest in the outcome of the trial. I think the jury would have been very interested to know that he stood to gain $800,000 if plaintiff recovered a sufficient verdict against Key, and I daresay that might have had something to do with the vigor with which plaintiff and Edwards attempted to exclude any reference to that fact from the jury's knowledge. Further, I do not understand how the disclosure of the amount of Edwards's financial interest in the outcome of the trial would be *unduly* prejudicial. The fact is that Edwards had a substantial financial stake in the outcome of the trial. That clearly is relevant. OEC 609. The concurrence suggests that the jury could have been "distracted or confused." I do not understand why. The point of the cross-examination is simple and straightforward: If the jury returns a verdict against Key of over $3 million, Edwards reaps the return of $800,000 from plaintiff. I do not see what is the least bit confusing about that.

In short, the trial court erred in its handling of the Mary Carter agreement in three ways. Each of the court's

errors substantially prejudiced Key, and each would justify reversal. The concurrence errs in concluding otherwise.

DEITS, C.J., and WARREN, J., join in this dissenting opinion.

22 P.3d 758

Supreme Court of Oregon.

Paul R. BOCCI, Jr., guardian ad litem for Paul R. Bocci, III, an incapacitated individual, Plaintiff,

v.

KEY PHARMACEUTICALS, INC., a foreign corporation, Schering-Plough Corporation, a foreign corporation, and Schering Corporation, a foreign corporation, Defendants,

and

Miles, Inc., an Indiana corporation, Miles, Inc., Pharmaceutical Division, an Indiana corporation, Legacy health System, an Oregon corporation, Legacy Immediate Care Clinic, Frederick D. Edwards, M.D., and The Eugene Clinic, a partnership, Defendants. Frederick D. Edwards, M.D., Respondent on Review,

v.

Key Pharmaceuticals, Inc., a foreign corporation, Schering-Plough Corporation, a foreign corporation, and Schering Corporation, a foreign corporation, Petitioners on Review.

(CC A9210-07050; CA A86556; SC S46461)

April 19, 2001.

On Petition for review filed May 18, 1999.*

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* Appeal from Multnomah County Circuit Court, William C. Snouffer, Judge. 158 Or.App. 521, 974 P.2d 758 (1999).

William F. Gary, Stanton F. Long, Sharon A. Rudnick, James E. Mountain, Jr., and Judith Giers, of Harrang Long Gary Rudnick P.C, Eugene filed the petition for petitioners on review.

Margaret A. Sundberg and Mary H. Spillane of Williams, Kastner & Gobbs PLLC, Seattle, Washington, filed the response for respondent on review. With them on the response were Daniel M. Holland and Ronald B. Terzenbach, of Loomis & Holland, Eugene.

Before CARSON, Chief Justice, and GILLETTE, DURHAM, KULONGOSKI, LEESON, and DeMUNIZ, Justices**

MEMORANDUM OPINION

The petition for review is allowed. The decision of the Court of Appeals is vacated. The case is remanded to the Court of Appeals for further consideration in light of *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001).

** Riggs, J., did not participate in the consideration or decision of this case.

47 P.3d 486 (Table)

(The Court's decision is referenced in a Pacific Reporter table captioned "Supreme Court of Oregon Petitions for Review.")

Supreme Court of Oregon

Bocci

v.

Key Pharmaceuticals, Inc., Miles, Inc.

NOS. A86556, S49240

June 04, 2002

178 Or.App. 42, 35 P.3d 1106

DENIED.

Oregon Revised Statutes

DAMAGES

18.540 Punitive damages; distribution; order of application. (1) Upon the entry of a judgment including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (c) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

(a) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.

(b) One-half of the remainder shall be paid to the prevailing party.

(c) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

(2) The party preparing the proposed judgment shall assure that the judgment identifies the judgment creditors specified in subsection (1) of this section.

(3) Upon the entry of a judgment including an award of punitive damages, the prevailing party shall provide notice of the judgment to the Department of Justice.

(4) Whenever a judgment includes both compensatory and punitive damages, any payment on the judgment by or on behalf of any defendant, whether voluntary or by

execution or otherwise, shall be applied first to compensatory damages, costs and court-awarded attorney fees awarded against that defendant and then to punitive damages awarded against that defendant unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

(5) Whenever any judgment creditor of a judgment which includes punitive damages governed by this section receives any payment on the judgment by or on behalf of any defendant, the judgment creditor receiving the payment shall notify the attorney for the other judgment creditors and all sums collected shall be applied as required by subsections (1) and (4) of this section, unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment. [1987 c.774, §3; 1991 c.862 §1]

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

PAUL R. BOCCI, JR., Guardian ad Litem for PAUL R. BOCCI, III, an incapacitated Individual, Plaintiff, v. KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation; SCHERING CORPORATION, a foreign corporation; MILES, INC., an Indiana corporation; LEGACY HEALTH SYSTEM, an Oregon corporation; LEGACY IMMEDIATE CARE CLINIC; FREDERICK D. EDWARDS, M.D.; and THE EUGENE CLINIC, a partnership, Defendants.	Civil No. 9210-07050 DEFENDANT KEY PHARMACEUTICALS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO HAVE THE MARY CARTER AGREEMENT DECLARED VOID (Specially Assigned to Honorable William C. Snouffer) (ORAL ARGUMENT REQUESTED)

Defendant Key Pharmaceuticals, Inc. requests oral argument as required by UTCR 5.050. Defendant provides the

* * *

portion of that which is recovered from the nonsettling defendants belongs to Dr. Edwards and The Eugene Clinic, and not Plaintiff. Thus, Dr. Edwards and The

Eugene Clinic are the real parties in interest in alignment with Plaintiff. Yet, they are named defendants in this action. Because of this anomaly created by the Agreement, it should be declared void. At the vary least, Dr. Edwards and The Eugene Clinic should be realigned and named as a party-plaintiff. *See, e.g., Wadsworth v. United States Postal Service*, 511 F2d 64 (7th Cir 1975).

g. Mary Carter Agreements deprive nonsettling defendants of their constitutional right to a fair trial.

Mary Carter agreements create a trial environment which is so unfair to the nonsettling defendants as to deprive them of their constitutional right to a fair trial. The Due Process clause of the Fourteenth Amendment guarantees litigants a fair trial. "[Litigants] have a due process right to fully and fairly litigate each issue in their case." *duPont v. Southern National Bank of Houston, Texas*, 771 F2d 874, 880 (5th Cir 1985), *cert denied* 475 US 1085, 106 S Ct 1467, 89 L Ed2d 723 (1986). Likewise, litigants have the right under the Oregon Constitution to "remedy by due course of law for every injury done him in his person, property, or reputation." Oregon Constitution, Art. I, § 10.

Mary Carter agreements, because of the sham of adversity they create, are inherently unfair to nonsettling defendants. This unfairness undermines the rights guaranteed by the United States and Oregon Constitutions. Thus, Mary Carter agreements in general, and particularly the one in this case, should be declared void as unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should dismiss Dr. Edwards and The Eugene Clinic from this action. In the alternative, this Court should declare the Agreement void as contrary to the expressed legislative intent of the State of Oregon and as against public policy.

DATED: June 17, 1994.

BULLIVANT, HOUSER, BAILEY,
PENDERGRASS & HOFFMAN

By (SIGNED) CLAY D. CREPS
Stephen F. English
Trial Attorney, OSB #73084
Marilyn E. Litzenberger,
OSB #88352
Clay D. Creps, OSB #92044

Attorneys for Defendants
Key Pharmaceuticals, Inc.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

PAUL R. BOCCI, JR., Guardian ad Litem for PAUL R. BOCCI, III, an incapacitated individual, Plaintiff, v. KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation, et al, Defendants.	)	Case No. 9210-07050
FREDERICK D. EDWARDS, M.D., Cross-Claim Plaintiff, v. KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation, et al, Cross-Claim Defendants.	)	

MOTION OF DEFENDANTS KEY PHARMACEUTICALS, INC., SHERING-PLOUGH CORPORATION AND SCHERING CORPORATION FOR JUDGMENT NOTWITHSTANDING THE VERDICTS OR, IN THE ALTERNATIVE, FOR A NEW TRIAL OR REMITTITUR

* * *

admits that he did not read the PDR.

In short, Plaintiff has failed to introduce any evidence concerning the third Oregon statutory requirement of "materiality and relevance."

Accordingly, this Court should grant judgment n.o.v. in favor of Defendants and set aside the awards of punitive damages to Dr. Edwards and Plaintiff. Punitive damages are disfavored under Oregon law. *McElwain v. Georgia-Pacific Corp.*, 245 Or 247, 259, 421 P2d 957 (1966); *Becker v. Pearson*, 241 Or 215, 220, 405 P2d 534 (1965). This Court should not broaden liability for punitive damages in the face of a statute that expressly precludes that liability.

2. The punitive damages are unconstitutional and excessive.

The jury awarded Plaintiff $35 million and Dr. Edwards $22.5 million in punitive damages. Oregon law, as now constrained by the Due Process Clause of the United States Constitution, does not permit punitive damages. Moreover, because neither Plaintiff nor Dr. Edwards established entitlement to *any* punitive damages, and because the awards of punitive damages are excessive, those awards must be set aside.

a. Punitive damages are not available under Oregon law, as constrained by the Due Process Clause of the United States Constitution.

The Supreme Court of the United States very recently held that, in order to satisfy the procedural Due Process

requirements of the Fourteen Amendment, Oregon courts must undertake "meaningful and adequate" post-verdict review of

* * *

appropriate given that the Oregon Supreme Court has held on numerous occasions that punitive damages are not favored in the law. *See, e.g., Becker v. Pearson, supra*, 241 Or at 220; *Smith v. Abel*, 211 Or 571, 595, 316 P2d 793 (1957). Thus, the elimination of punitive damage awards would not be an unreasonable rule. It would avoid a conflict between the Oregon and United States Constitutions, and the result would mean that both constitutional provisions would prevail over a common-law right.

b. This court should remit a portion of the punitive damage awards because they violate the Due Process Clause of the United States Constitution.

In the event that this Court determines that punitive damages can properly still be awarded in Oregon after *Oberg*, the awards in this matter are so excessive as to violate the Due Process Clause and, therefore, this Court should enter a judgment that remits all or some portion of those damages. In this regard, see Defendants' alternative motions for a new trial and for remittitur at pages 40-56 below.

The jury determined that Plaintiff was partially (35%) at fault for not informing Dr. Edwards that he was taking other medications, specifically, ciproflaxacin [sic]. An award of punitive damages against a drug manufacturer that cannot control the conduct of parties using its products cannot be condoned under the Due Process Clause. A

windfall of $35 million and $22.5 million, respectively, to two parties whose own errors gave rise to their injuries simply cannot be justified under the Fourteenth Amendment.

In *Oberg*, the Supreme Court held that "the [United States] Constitution imposes a substantive limit on the size of punitive damage awards," thus acknowledging that there is a Due Process limitation on the size of punitive damage awards. 114 S Ct 2331, 2335. Although the Supreme Court has not made clear what that limit may be, or what factors govern the analysis, the awards in this matter surely exceed that amount. An award of a total of $57.5 million in punitive damages against a drug manufacturer that complied with FDA regulations and provided a package insert that, had it been read, would have provided the necessary information to a doctor (had he been given adequate information by a patient who was taking contra-indicated medications), is excessive in fact, in fairness and as a matter of law.

3. In the alternative, this Court should reduce the punitive damages awarded Plaintiff and Dr. Edwards to $10 million each on the ground that this Court erred in allowing Plaintiff and Dr. Edwards to amend their prayers for punitive damages.

Until days after Plaintiff had rested his case at trial, both Plaintiff and Dr. Edwards had prayers for punitive damages that were limited to $10 million each. The parties had gone to trial on those prayers. The Court's decision to allow Plaintiff and Dr. Edwards to amend their prayers severely prejudiced Defendants.

Certainly, motions to amend are committed to the sound discretion of the trial court. *Giordano v. Aerolift, Inc.*, 109 Or

* * *

809-111, 609 P2d 848 (1980). Therefore, the arguments set forth above (at pages 19-29) are incorporated in this alternative Motion for New Trial.

D. Errors of law

There were numerous errors of law during the course of the trial, and each justifies the granting of a new trial. Those errors fall into six categories: (1) errors regarding punitive damages; (2) errors regarding noneconomic damages; (3) errors regarding the Mary Carter Agreement; (4) jury instruction errors; (5) the erroneous jury verdict form; and (6) errors regarding evidentiary rulings.

1. The punitive damage awards are excessive.

Defendants are entitled to a new trial on the ground that the punitive damages awarded Plaintiff and Dr. Edwards are excessive. In the alternative, this Court should declare that the punitive damages awarded Plaintiff and Dr. Edwards are excessive, and the Court should condition denial of Defendants' Motion for New Trial on remissions by Plaintiff and Dr. Edwards in the amounts that such awards are excessive.

The combined punitive damage awards in this case represent by far the largest in Oregon history, more than 11 1/2 times greater than any ever previously upheld by Oregon courts! This Court has the responsibility, and

possesses the power, to remit the unwarranted and clearly excessive punitive damage awards. Defendants are entitled to such relief both as a matter of Oregon law and under the Due Process Clause of the United States Constitution.

Since 1910, when an amendment to Article VII, section 3, ("Art. VII, § 3") of the Oregon Constitution was enacted, courts have construed that provision to prevent post-verdict judicial review of punitive damage awards based solely on grounds that such awards are excessive. *See, e.g., State ex rel Young v. Crookham*, 290 Or 61, 68 618 P2d 1268 (1980) (remittitur not available in Oregon to reduce excessive punitive damage awards). Courts have relied on that provision to deny motions for new trials that have been based solely on the ground that damages awarded by a jury were excessive. *See, e.g., Timmins v. Hale*, 122 Or 24, 43-44, 256 P 770 (1927) (Court reasoned that "trial courts no longer have the power to grant a new trial because of the belief that damages awarded are excessive"). The amended constitutional provision provides in pertinent part:

> In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and *no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.* (Emphasis added.)

On June 24, 1994, the Supreme Court of the United States held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes a substantive limit on punitive damage awards and that Oregon's denial of post-verdict judicial review of the size of

punitive damage awards (based on Art. VII, § 3) violates the Due Process Clause of the

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

PAUL R. BOCCI, JR., Guardian ad Litem for PAUL R. BOCCI, III, an incapacitated individual, Plaintiff, v. KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation, et al, Defendants.	) No. 9210-07050) REPLY MEMORANDUM OF DEFENDANTS KEY PHARMACEUTICALS, INC., SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICTS OR, IN THE ALTERNATIVE, FOR A NEW TRIAL OR REMITTITUR
FREDERICK D. EDWARDS, M.D., Cross-Claim Plaintiff, v. KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation, et al, Cross-Claim Defendants.	)

* * *

210 P2d 461 (1949). For reasons discussed here and in Defendants' Motion, the punitive damages awarded to

Plaintiff and Dr. Edwards are clearly contrary to the weight of the evidence.

The Criteria to Consider in Remitting Excessive Punitive Damage Awards

Plaintiff and Dr. Edward have improperly interpreted ORS 30.925(c)(a)[4] and have failed to distinguish between the harm allegedly done to Plaintiff as opposed to the harm allegedly done to Dr. Edwards.

Defendants do not doubt that "brain damage and death qualify as 'serious harm.'" (Edwards' Response 50) However, the *likelihood* of such harm, and more particularly, the likelihood of its arising from the type of misconduct alleged in this case, is remote considering the fact that the subject of theophylline toxicity and its symptoms is taught in medical school (Tr 1867-68) and has been widely disclosed in the medical literature of the last several decades (Tr 1659-60), and also considering the fact that the warnings issued by Defendants via the package insert, PDR, and product information printed in every advertisement and promotional piece for Theo-Dur were in compliance with FDA regulations and class labeling. Those warnings identified the risk of toxic reactions including convulsions and death, the prospect of reduced clearance for a variety of reasons leading to toxicity, the need to monitor blood levels in order to predict life threatening toxicity, and the very symptoms of toxicity that

[4] One of the factors set out in ORS 30.925(3)(a) which is to be considered is "[t]he likelihood at the time that serious harm would arise from the defendant's misconduct."

Plaintiff presented to Dr. Edwards. The *likelihood*, on these facts, that any other physician would misdiagnose theophylline toxicity, as Dr. Edwards did, is too remote to warrant the punitive damages awarded Plaintiff and Dr. Edwards.

In addition, although the injuries sustained by Plaintiff certainly qualify as "serious harm," the harm complained of by Dr. Edwards (as distinct from his patient) was mild in comparison. Furthermore, the harm was unsupported by the evidence and was too remote and speculative to support the kind of punitive damage award he obtained. When asked at trial if he suffered any emotional damages, Dr. Edwards replied, "I think so." (Tr 1179) He testified as to being tearful and as to having trouble sleeping. (Tr 1178, 1179) Furthermore, he was unable to offer any objectively verifiable economic damages in support of his loss of reputation claim. (Tr 2698-99) The $22.5 million the jury awarded Dr. Edwards is not only incredible on these facts, it is preposterous!

With respect to Defendants' awareness of the likelihood of harm [ORS 30.925(3)(b)], Plaintiff and Dr. Edwards have conveniently forgotten the Oregon Supreme Court's observation in the case upon which they so heavily rely, *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or 375, 528 P2d 522 (1974):

* * *

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

PAUL R. BOCCI, JR., Guardian ad Litem for PAUL R. BOCCI, III, an incapacitated individual, Plaintiff, v. KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation; SCHERING CORPORATION, a foreign corporation; MILES, INC. an Indiana corporation; LEGACY HEALTH SYSTEM, an Oregon corporation; LEGACY IMMEDIATE CARE CLINIC; FREDERICK D. EDWARDS, M.D.; and THE EUGENE CLINIC, a partnership, Defendants. FREDERICK D. EDWARDS, M.D., Cross-Claim Plaintiff, v. KEY PHARMACEUTICALS, INC., a foreign corporation,	Case No. A9210-07050 OPINION DENYING POST-TRIAL MOTIONS

SCHERING-PLOUGH CORPORATION, a foreign corporation; SCHERING CORPORATION, a foreign corporation,

Cross-Claim Defendants.

The defendants' Motions for New Trial, Remittitur, and for Judgment N.O.V. came before me on October 28, 1994. The motions were briefed thoroughly and extensively, and I appreciate the

* * *

Theo-Dur to patients other than plaintiff. There was evidence that defendants misrepresented to the medical community the safety of Theo-Dur, thus lulling physicians into a false sense of security about the use of the drug which, the jury was entitled to infer, led Dr. Edwards to not recognize theophylline toxicity in plaintiff. There is evidence that this chain of events was causally and directly connected with damages to both plaintiff and to Dr. Edwards.

The jury's assessment of punitive damages, in the sum of $57.5 million is not "grossly excessive" and does not violate federal due process. The award is entirely reasonable under the facts of this case and is appropriately proportional in relation to the damages caused when compared with defendants' financial condition. A review of the amounts assessed and the standards the jury was instructed to apply shows that there is no basis to order a new trial or to grant a remittitur.

The evidence was that defendants' 1993 sales were approximately $4,300,000,000, and 1993 profits were approximately $1,100,000,000. The punitive damages assessed in this case approximate 5 percent of defendants' 1993 profits, or 1.3 percent of 1993 sales. The jury also heard that the market value of defendants' companies ranges from $10.1-13.9 billion. Assuming a median market value of $12.0 billion, the punitive damages in this case equal .00479% of that 1993 market value. Given the gargantuan size of defendant's companies, it cannot be said that the amount of punitive damages in this case "shocks the

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IN THE COURT OF APPEALS FOR THE STATE OF OREGON

PAUL R. BOCCI, JR., Guardian ad litem for PAUL R. BOCCI, III, an incapacitated individual, Plaintiff-Respondent, v. KEY PHARMACEUTICALS, INC., a foreign corporation, SCHERING-PLOUGH CORPORATION, a foreign corporation, and SCHERING CORPORATION, a foreign corporation, Defendants-Appellants, and MILES, INC. an Indiana corporation, MILES, INC. PHARMACEUTICAL DIVISION, an Indiana corporation, LEGACY HEALTH SYSTEM, an Oregon corporation, LEGACY IMMEDIATE CARE CLINIC, FREDERICK D. EDWARDS, M.D., and THE EUGENE CLINIC, a partnership, Defendants.	Trial Court No. A9210-07050 Appellate Court No. A86556

FREDERICK D. EDWARDS, M.D.,

Cross-Claim Plaintiff-Respondent,

v.

KEY PHARMACEUTICALS, INC., a foreign corporation, SCHERING-PLOUGH CORPORATION, a foreign corporation, and SCHERING CORPORATION, a foreign corporation,

Cross-Claim Defendants-Appellants.

APPELLANTS/CROSS-CLAIM APPELLANTS' BRIEF

* * *

Court's analysis in *Haslip* makes clear that some specific standards that provide a meaningful check on the jury's or trial court's discretion are required. The standard of review enunciated by the Oregon Supreme Court in *Oberg* fails to meet this constitutional threshold.

In fact, the Oregon Supreme Court failed to provide any specific, substantive standards for the review of punitive damage awards. The Supreme Court held only that the award must be "within the range that a rational juror would be entitled to award in the light of the record as a whole" as measured by the "statutory and common law factors that allow an award of punitive damages for

the specific kind of claim at issue." *Oberg*, 320 Or at 549. The constitutional problem with this test is apparent in light of *Haslip*: it leaves open the real potential for the exercise of unlimited discretion by the trial and appellate courts when reviewing jury awards of punitive damages. Certainly, in some situations, the statutory and common law factors governing the award of punitive damages for the particular claim at issue might provide the specific and detailed substantive review standards required by due process; but in other cases they will not. In short, the constitutionally mandated procedural safeguards described in *Haslip* are not guaranteed by the standard for judicial review established by the Oregon Supreme Court in *Oberg*, and for that reason alone, the award of punitive damages in this case must be deemed unconstitutional as well.[57]

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[57] The award of punitive damages at issue here is unconstitutional in violation of due process for a second reason: because federal due process prohibits punishing a party for conduct that occurred outside the jurisdiction. In *BMW of North America Inc. v. Gore*, 646 So 2d 619 (Ala 1994), *cert allowed* ___ US ___,115 S Ct 932,130 L Ed 2d 879, (1995), the Alabama Supreme Court reviewed an award of punitive damages against BMW in a case relating to BMW's failure to disclose that the paint finish on a new automobile had been damaged and repaired. BMW appealed from a judgment entered on a jury verdict awarding the plaintiff compensatory damages of $4000 and punitive damages of $4 million. The Alabama Supreme Court upheld the verdict but remitted the punitive damages to $2 million. The Court found that the evidence of BMW's non-disclosure in other jurisdictions was admissible to show the company's pattern and practice, but that the number of similar acts that BMW committed in other jurisdictions could not be used as a multiplier in determining the amount of punitive damages. The record showed that the jury's punitive damages award was based on a multiplication of $4000 (the diminution in value of plaintiff's vehicle) times 1000 (approximately the number of refinished

(Continued on following page)

b. The Trial Court Erred in Finding That the Award of Punitive Damages in This Case Was Not Excessive

In its opinion denying post-trial motions, the trial court undertook to review the size of the punitive damages awarded in this case, and deemed the awards to be reasonable in light of federal due process requirements. App-101 to App-108. The sum and substance of the court's review is an analysis of the evidence in the record in light of the factors set out in ORS 30.925, which establishes the criteria for awarding punitive damages in a products liability action.

The court's approach to judicial review of these jury awards contains a fundamental flaw: the court reviewed the two punitive damage awards made by the jury as a single award for $57.5 million, and then determined, in light of the factors applicable to a strict products liability case, that that amount awarded collectively to Plaintiff and Edwards was not excessive. In fact, Key is entitled to have the trial court review each award separately, in light of the appropriate criteria for awarding punitive damages.

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vehicles sold in the United States), but the evidence at trial was that, at most, 14 cars were sold in Alabama. The Court remitted the punitive damages award, holding that $2 million is "a constitutionally reasonable" punitive damages award. 646 So 2d at 629.

In this case, the jury was presented with evidence of Key's conduct that occurred outside Oregon, and was allowed to consider that evidence in evaluating punitive damages, in violation of federal due process. On January 23, 1995, the U.S. Supreme Court granted a petition for writ of certiorari to hear arguments in the *BMW* case. ___ US ___,115 S Ct 932,130 L Ed 2d 879 (1995).

First, while Plaintiff's claim may be characterized as a strict products liability case, Edwards' case cannot. The jury considered only Edwards' claims for negligence and fraud. In fact, Edwards dismissed a third claim for products liability before trial. Tr. at 3613-14. Thus, although the trial court attempted to conduct some form of post-trial review of the jury's award of punitive damages, it applied substantive standards for awarding punitive damages that simply do not apply to the claims brought by Edwards and decided by the jury. The trial court's unitary application of products liability criteria to evaluate the punitive damages awards to both Plaintiff *and* Edwards violates the review standard adopted by the Oregon Supreme Court in *Oberg*.

Second, and perhaps most critical, the trial court denied Key the opportunity to have each punitive damage award reviewed on its own merits. For the purposes of review, the trial court treated the punitive damages in this case as a single award of $57.5 million. In fact, the jury made two separate awards of punitive damages: $35 million to Plaintiff, and $22.5 million to Edwards. When viewed as separate awards, the jury's verdicts are inexplicable. The jury awarded $35 million to Plaintiff, A-26, a patient who suffered brain damage as a result of a drug interaction. Plaintiff had substantial economic damages, and faces a lifetime of reduced mental capability. The same jury awarded $22.5 million to Edwards, A-25, the doctor who, by his own admission, failed to read the warnings about this drug interaction available to him, and then missed the apparent diagnosis of Plaintiff's condition. Edwards had no economic damages. His "injury" was the emotional distress of being sued for negligence. The vast difference between the circumstances of Plaintiff and

Edwards makes it impossible to reconcile the two punitive damages awards.

Although the purpose of punitive damages is generally to punish present misconduct and to deter similar conduct in the future, the U.S. Supreme Court has clearly stated that the trial court must also consider the seriousness of the injury sustained or threatened in determining whether an award of punitive damages is constitutionally excessive. Due process is violated if a punitive damage award is so large in comparison to the caused or threatened harm that it "shocks the conscience." See discussion at 112-14. When viewed in light of Edwards' own conduct and the harm that he supposedly suffered, a punitive damage award to him of $22.5 million is nothing less than shocking.

Even if the trial court had applied constitutionally sufficient standards to its judicial review of the jury's punitive damages awards, its conclusion that the jury's collective award of punitive damages in the amount of $57.5 million was not "grossly excessive" is not supported by proper evidence. In effect, the court's perception was infected by the same virus that affected the jury's verdict: the mischaracterization of the law and the facts, created by the collusive efforts of Plaintiff and Edwards, and intended to place full responsibility for Plaintiff's injuries on Key.

Throughout this brief, we have described the procedural, evidentiary and substantive errors that produced a distorted legal and factual picture before the jury. The shockingly high punitive damage awards in this case bears no relationship at all to Key's culpability. Instead, the awards are merely the best evidence that Plaintiff's and

Edwards' collusive scheme worked. Plaintiff failed to provide vital information about his theophylline use to the physician who prescribed Ciprofloxacin. Edwards failed to diagnose and treat *recognized* symptoms of theophylline toxicity. And Key is punished while Plaintiff and Edwards are richly rewarded. The result in this case is so counter-intuitive – and so patently unfair – that it discredits the legal system which produced it. Fundamentally, judicial review of punitive damages is intended to correct the arbitrary result that can occur when the fact-finding process goes awry. Here, no meaningful judicial review of the verdicts has yet occurred.

The problem with the trial judge's review of punitive damages is apparent: it is based on the same faulty record as was the jury's verdict. The judge, like the jury, based his opinion concerning the amount of punitive damages on erroneous legal standards created by Plaintiff's and Edwards' "expert" witnesses, and on evidence that has nothing to do with the legal duties Key actually owed. See discussion at 71-79.

For example, the court found substantial evidence that Key failed to notify the medical community promptly about adverse reactions to theophylline. App-104. The sum and substance of the evidence offered by Plaintiff and Edwards, however, did not deal with any failure to warn of a potential drug interaction or any other adverse reactions. The relevant warning – of the theophylline/Ciprofloxacin drug interaction – was contained in the Theo-Dur package insert, and reproduced in the PDR Supplement well before Plaintiff's injuries. Ex. 308, 318. Plaintiff's and Edwards' evidence, instead, insinuated that Key should have been responsible for alerting physicians about how to diagnose and treat theophylline toxicity. The evidence offered at

trial about Key's duty to warn the medical community fails to support the awards of punitive damages, for the same reasons it fails to support assessing liability against Key in the first instance. See discussion at 71-79.

The trial court found sufficient evidence that Key misrepresented to the medical community the safety of Theo-Dur and that this was causally and directly connected to Plaintiff's and Edwards' damage. App-104. In fact, Plaintiff did not produce evidence of such a causal link. The evidence establishes that Plaintiff did not tell Dr. Davis, who prescribed Ciprofloxacin, that he was taking theophylline. Tr. at 2488. Plaintiff did not tell Edwards, who knew about the theophylline usage, that he had taken Ciprofloxacin. Tr. at 1270-73. In these circumstances, no warning could have prevented Dr. Davis from prescribing Ciprofloxacin, or Edwards from misdiagnosing Plaintiff's theophylline toxicity. No warning could correct Plaintiff's own failure to inform his physicians of his medication usage. No other form of warning about the nature of theophylline toxicity symptoms, with which Edwards admitted he was familiar, Tr. at 1436, would have caused Edwards to take seriously the obvious possibility that Plaintiff was toxic and to order an appropriate blood test. When viewed in light of Key's actual legal duty to warn, it is apparent that there is no causal link between Key's actions and Plaintiff's harm to support these awards of punitive damages. See discussion at 79-82.

The judge's conclusion that the punitive damages awarded in this case were reasonable is wrong because the standard of care by which the court was measuring Key's conduct is wrong. The evidence in the record which supposedly proves a violation by Key of its legal duty to warn is irrelevant in light of an accurate statement of the law.

The trial court should have set aside the punitive damage awards in this case because they is [sic] the product of the passion and prejudice against Key which Plaintiff and Edwards deliberately created. Throughout the trial, the court committed repeated errors which abetted the creation of an environment in which awards such as these could arise. By failing to recognize the injustice of the punitive damage awards, the trial court transformed its earlier missteps into error of constitutional dimension.

D. Error Related to Compensatory Damages

Assignment of Error Number Twenty-Five

The trial court erred in refusing to cap Plaintiff's non-economic damages pursuant to ORS 18.560(l).

Pertinent portions of the trial court record pertaining to assignment of error number twenty-five are set out verbatim at App-44 to App-45.

E. Standard of Review

The trial court's refusal to cap plaintiff's non-economic damages pursuant to ORS 18.560(1) (assignment of error number twenty-five) is reviewed for error of law. *See*

* * *

IN THE COURT OF APPEALS FOR THE
STATE OF OREGON

PAUL R. BOCCI, JR., guardian ad litem for PAUL R. BOCCI, III, an incapacitated individual, Plaintiff-Respondent, v. KEY PHARMACEUTICALS, INC., a foreign corporation, SCHERING PLOUGH CORPORATION, a foreign corporation, and SCHERING CORPORATION, a foreign corporation, Defendants-Appellants, and MILES, INC., an Indiana corporation, MILES, INC., PHARMACEUTICAL DIVISION, an Indiana corporation, LEGACY IMMEDIATE CARE CLINIC, FREDERICK D. EDWARDS, M.D., and THE EUGENE CLINIC, a partnership, Defendants.	Trial Court No. A9210-07050 Appellate Court No. A86556
FREDERICK D. EDWARDS, M.D., Cross-Claim Plaintiff-Respondent, v.	

KEY PHARMACEUTICALS, INC., a foreign corporation, SCHERING-PLOUGH CORPORATION, a foreign corporation, and SCHERING CORPORATION, a foreign corporation,

Cross-Claim Defendants-Appellants.

CROSS-CLAIM RESPONDENT'S BRIEF

Appeal from Judgments of September 9, 1994, and January 19, 1996 of the Multnomah County Circuit Court Honorable William C. Snouffer

CROSS-CLAIM RESPONDENT'S BRIEF
STATEMENT OF THE CASE

1. Response – Nature of the Action.

Pursuant to ORAP 5.77(3)(a), Dr. Edwards adopts respondent Bocci's Statement of the Case, ¶ 1, "Nature of the Action."

2. Response – Nature of the Judgment.

Dr. Edwards accepts Key's statement.

3. Response – Basis of Appellate Jurisdiction.

Dr. Edwards accepts Key's statement.

4. Response – Effective Date of Judgment.

Dr. Edwards accepts Key's statement as to the effective date of the judgment for purposes of when the judgment became appealable.

5. Response – Questions Presented on Appeal.

Dr. Edwards' rejects Key's statement of the questions presented on appeal as it is argumentative in violation of ORAP 5.40(6). Pursuant to ORAP 5.77(3)(a), Dr. Edwards adopts respondent Bocci's Statement of Questions Presented on Appeal Nos. 1-9 related to Key's Assignment of Error Nos. 1-9. Questions presented as to Key's Assignment of Error Nos. 10-17 and 25 do not relate to Dr. Edwards.

As to Key's Assignment of Error Nos. 18-24, the questions on appeal are more properly stated as follows:

> Assignment of Error No. 18. Was there evidence or reasonable inference therefrom, viewed in a light most favorable to Dr. Edwards, to support the jury's verdict for Dr. Edwards on his claims?
>
> a. Has Key properly preserved for appeal the arguments it raises?
>
> Assignment of Error No. 19. Did the trial court properly exercise its

* * *

Nor has Key shown that the punitive damage award to Dr. Edwards was excessive under the factors considered in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 US ___, 113 S Ct 2711, 125 L Ed 2d 366 (1993). There, the U. S. Supreme Court left undisturbed an award of $10,000,000 in

punitive damages imposed on a defendant for slander of title, which was *526 times* larger than the $19,000 awarded as actual damages. In upholding this award, the Supreme Court reasoned:

> In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

Id. at 2722. Many of the same factors that justified the award in *TXO* are present here.[80] This case involved a much more personal loss, that of a physician's reputation due to a bad outcome in treating a patient. The punitive

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[80] Given the intentional promotion of Theo-Dur® as the "safe" theophylline, the potential harm to patients and physicians from using the drug under a false impression of its safety, stability and reliability is incalculable, but easily in the millions. There was also ample evidence from which the jury could – and did – find a "knowing violation" of FDA regulations and a pattern of misleading conduct occurring over many years. App-104-108. Finally, the only evidence of Key's wealth indicates that the award is but a pittance of Key's market value and earnings. App-104.

award is 45 times, not 526 times, the actual damages. In light of the pattern and scale of Key's fraudulent marketing practices, the harm that occurred, the risk of harm to other patients and their physicians, and the sales generated due to Key's wanton disregard for public safety and health, that award is reasonable, not excessive. Given the evidence presented in this case, certainly a rational jury *could* award $22,500,000 to punish Key, especially in light of Key's substantial gross annual revenues and net worth (both over $4 billion in 1993).

The $22,500,000 award was manifestly reasonable under the ORS 30.925 factors. It may be punitive, but that is the point of punitive damages. As the Oregon Supreme Court has explained:

> The legal doctrine of punitive damages is founded on the theory that certain intentional acts should be punished or deterred. Punishment and deterrence concern behavior that society finds undesirable. Punishment and deterrence are not related to actual or compensatory damages. Punitive damages are not to compensate an injured party, but to give bad actors a legal spanking.

Lane County v. Wood, 298 Or 191, 203, 691 P2d 473 (1984).

The jury and the trial court properly distinguished between the amount of damages necessary to *compensate* Bocci and Dr. Edwards and the amount of punitive damages necessary to punish Key. The primary focus of punitive awards is not on compensatory damages, but on, among other things, the nature and duration of the conduct, the risk it presents, and what amounts are appropriate to ensure deterrence. While courts on occasion have considered the mathematical relationship between the

amounts of punitive damage awards and compensatory awards, there is no bright line test. Key has not argued on appeal that the amount of the compensatory award to Dr. Edwards was not supported by the evidence, and it glosses over the fact that, notwithstanding Key's view of Dr. Edwards' conduct, the jury found him zero percent at fault. Key's misrepresentations as to Theo-Dur®'s safety exposed not only Bocci but also other patients like him to harm, and caused health care providers, including Dr. Edwards, to fail to apprehend emergent situations. This led in Dr. Edwards' case, and carries the potential to cause in many other cases, not only harm to patients, but also harm to physicians through exposure to assertions of malpractice and the questioning of their professional competence and judgment.

B. The Punitive Damages Award to Dr. Edwards Was Not the Product of Passion or Prejudice.

Contrary to Key's assertion, Key Br. at 120, the jury's punitive damage award to Dr. Edwards was not "the product of passion and prejudice." Nor can it be said that the award is grossly excessive on its face, or that no reasonable jury could award $22,500,000 to punish Key for its conduct in light of the evidence the jury considered.[81] Dr. Edwards asked the jury to award $35,000,000 in punitive damages; the jury did not award that amount.

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[81] These three standards are mentioned but not mandated in the U.S. Supreme Court's decision in *Honda v. Oberg*, 114 S Ct at 2341 n 10. Under the Oregon Supreme Court's decision on remand in *Oberg v. Honda*, the "no rational juror" standard is the proper one for this court to apply.

Thus, a reviewing court cannot say as a matter of law that the punitive damage award to Dr. Edwards is unmistakably the product of passion or prejudice.

As a juror pointed out to Mr. Garnier in voir dire, Tr. 294, a monetary penalty cannot be punitive or a deterrent unless it has a meaningful impact on the defendant. The court observed in *Burnett v. National Enquirer, Inc.*, 193 Cal Rptr 206, 218 (Cal App 1983), "[T]he function of deterrence * * * will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." The punitive damage award to Dr. Edwards represents the jury's determination that $22,500,000 is an amount that will punish Key for its fraudulent marketing practices in the past and deter it from engaging in such conduct in the future. The jury's punitive damage award to Dr. Edwards encourages Key to make sure it fulfills the duty it owes to doctors and patients of fully informing physicians consistently with both the letter and the spirit of FDA regulations so that recurrences of what happened here can be prevented.

Defendants' 1993 sales, as the trial court noted, were approximately $4,300,000,000, with 1993 profits of approximately $1,100,000,000. App-104. The trial court observed that the punitive damages assessed in the case approximated five percent of defendants' 1993 profits, or 1.3 percent of 1993 sales. *Id.* The award to Dr. Edwards reflected .00479 percent of defendants' 1993 market value. *Id.* If defendants' profits have continued at the same rate, it would take approximately eight days of earnings for defendants to pay Dr. Edwards' punitive damage award,

and approximately 12 days to pay Bocci's punitive damage award.[82] The trial court concluded:

> The award is entirely reasonable under the facts of this case and is appropriately proportional in relation to the damages caused when compared with defendants' financial condition. * * * Given the gargantuan size of defendant's companies, it cannot be said that the amount of punitive damages in this case "shocks the conscience" of the court.

App-104 to App-105.

The award of punitive damages was eminently rational in light of Key's knowledge of the dangers of Theo-Dur®, as contrasted with its aggressive marketing of its product as safe through Dear Doctor letters, Dear Pharmacist letters, journal advertisements, patient cards, and detailers all over the country. The jury was right: Key misrepresented and withheld important information from the medical community in general and from Dr. Edwards individually; Key wantonly disregarded the health and safety of asthmatics and the interests of the doctors who treat them; and Key's misconduct was a substantial factor in the harm to Dr. Edwards' reputation and his emotional distress. The $22,500,000 award punishes Key for its misconduct and, one hopes, will deter it from future misconduct.

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[82] As the trial court noted, defendants made the tactical choice to present no financial data for the jury to consider in assessing punitive damages and thus the range of alternative measurements was limited. App-105.

Response to Assignment of Error No. 24

The trial court did not abuse its discretion in admitting Ex, 3.

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IN THE COURT OF APPEALS
FOR THE STATE OF OREGON

PAUL R. BOCCI, JR., guardian ad litem for PAUL R. BOCCI, III, an incapacitated individual,	Trial Court No. A9210-07050
Plaintiff-Respondent,	
v.	Appellate Court No. A86556
KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation, SCHERING CORPORATION, a foreign corporation,	
Defendants-Appellants,	
and	
MILES, INC., an Indiana corporation, MILES, INC., PHARMACEUTICAL DIVISION, an Indiana corporation, LEGACY HEALTH SYSTEM, an Oregon corporation, LEGACY IMMEDIATE CARE CLINIC, FREDERICK D. EDWARDS, M.D., and THE EUGENE CLINIC, a partnership,	
Defendants.	

FREDERICK D. EDWARDS, M.D.,

Cross-Claim Plaintiff-Respondent,

v.

KEY PHARMACEUTICALS, INC., a foreign corporation, SCHERING-PLOUGH CORPORATION, a foreign corporation, and SCHERING CORPORATION, a foreign corporation,

Cross-Claim Defendants-Appellants.

APPELLANTS/CROSS-CLAIM APPELLANTS' REPLY BRIEF

* * *

130 L Ed 2d 879 (1995), which has been affirmed by the United States Supreme Court. *BMW of North America Inc. v. Gore*, ___ US ___, 116 S Ct 1589, 134 L Ed 2d 809 (1996). This recent case clarifies the Due Process protections to which Key is entitled, and warrants this Court's attention. This decision underscores the fact that the punitive damage awards here do not pass constitutional muster.

a. The Punitive Damages Awards Are Excessive Because Key Was Not Afforded The Constitutional Prerequisite of Adequate Notice.

The United States Supreme Court decided the *BMW* case because the Court "believed that a review of [the] case would help illuminate 'the character of the standard that will identify constitutionally excessive awards' of punitive damages[.]" *BMW*, ___ US at ___, 116 S Ct at 1595 (citations omitted). One of the principles on which the Court shed light was the constitutional principle of fair notice:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment *but also of the severity of the penalty that a State may impose. Id.* at 1598.

Key argued at pages 116-120 of its opening brief that the punitive damages awarded here are unconstitutionally excessive. The Supreme Court's illumination of the constitutional standard of fair notice underscores that fact.

The Court in *BMW* identified "[t]hree guideposts," each of which indicate whether a state has provided adequate notice of the magnitude of sanction that might be imposed for particular misconduct: the degree of reprehensibility of the misconduct; the disparity between the harm or potential harm suffered by the Plaintiff and the punitive damages awarded; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *Id.* at 1598-99.

According to the Supreme Court, the degree of reprehensibility of the defendant's conduct is "[p]erhaps the

most important indicium of the reasonableness of a punitive damages award[.]" *Id.* at 1599. The Court relied on a long line of cases establishing the principle that the amount of punitive damages imposed must reflect the "enormity of [the] offense," which, according to the Court, reflects the fact that "some wrongs are more blameworthy than others." *Ibid.*

The Court went on to note certain aggravating factors associated with particularly reprehensible conduct. The first is the nature of the harm – whether the harm involved only economic injury, or risk to the health or safety of others. *Ibid.* This guidepost particularly demonstrates the unreasonableness of the $22.5 million award to Edwards. The only alleged injury to Edwards was an economic one: injury to his professional reputation. Misconduct that causes only economic harm, according to the Supreme Court, is not "sufficiently reprehensible to justify a significant sanction in addition to compensatory damages." *Ibid.*

Moreover, the Supreme Court recognized that a state's legislative policy statements stand as advance notice of the state's priorities and policies-choices. The Supreme Court noted that some state legislation is intended to create a "safe harbor," which might imply that the state's priority is to encourage certain activity within the state, by limiting a defendant's exposure to substantial, or any, awards of punitive damages. In the Supreme Court's view, the existence of these types of laws reflects a policy choice of tolerance, which, in turn, should inform the evaluation of the severity of misconduct. *Id.* at 1600-01. Here, the Oregon legislature enacted ORS 30.927, the language and history of which establish an intent to create a safe harbor from punitive damage liability for drug manufacturers, as

long as neither the FDA nor the prescribing physician are knowingly misled in the circumstances. In light of this legislative policy, Key was denied the constitutional prerequisite of fair notice that it might suffer liability for punitive damages of the magnitude awarded either to Plaintiff or to Edwards.

The second "guidepost" cited by the Supreme Court as an indicator of an excessive punitive damage award is "its ratio to the actual harm inflicted on the plaintiff." *Id.* at 1601. This guidepost, too, particularly underscores the excessiveness of the punitive damages awarded to Edwards. Edwards alleged that his professional reputation was damaged, and he was distressed by a lawsuit that he invited Plaintiff to file in a case he had already settled. In response, the jury awarded Edwards $22.5 million. The jury made this award despite the fact that Edwards, by his own admission, failed to read warnings available to him about Theo-Dur's dangerous propensities, considered and rejected without follow-up theophylline toxicity as a cause of Plaintiff's symptoms, and missed the apparent diagnosis of Plaintiff's condition. The jury punished Key by giving Edwards 45 times the amount of his compensatory damages for his purely economic injury. The punitive damage award to Edwards reveals plainly that the jury's verdict was mightily influenced by passion and prejudice against Key. There is no other rational explanation for such an award. The same passion and prejudice undoubtedly influenced the entire cumulative punitive damage award of $57.5 million. The entire award cannot be sustained.

Finally, the Court identified the third indicator of excessiveness as the comparison between the punitive damages award and the civil or criminal penalties that

could be imposed for comparable misconduct. The Court noted that a reviewing court considering whether an award of punitive damages is excessive should give substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue. *Id.* at 1603. The maximum civil and criminal sanctions available under federal law to punish the type of conduct of which Key is accused highlight the grossly excessive nature of the punitive damages awarded here both to Plaintiff and to Edwards.

The Federal Food, Drug and Cosmetic Act includes an enforcement scheme applicable to drug manufacturers which commit acts prohibited by that statute. The statute provides in part that manufacturing, misbranding, delivering for sale and selling misbranded drugs are prohibited acts. 21 USC § 331. A drug is misbranded if, among other things, its labeling is false or misleading in any particular. 21 USC § 352(a).

Federal statute provides for both criminal fines (21 USC § 333) and civil penalties (21 USC § 335b) for violations of 21 USC § 331. A drug manufacturer who violates 21 USC § 331 may be subject to criminal fines of up to $1,000 and imprisonment for not more than one year. 21 USC § 333(a)(1). A person who commits a prohibited act after final conviction under 21 USC § 333(a)(1), or who violates that statute with intent to defraud or mislead, may be fined a maximum of $10,000 and imprisoned for up to three years. 21 USC § 333(a)(2). Civil penalties of up to $1 million may be imposed upon a corporation for, among other things, knowingly making or causing to be made a false statement or misrepresentation of a material fact in connection with an abbreviated drug application; or knowingly failing to disclose a material fact which a

person has an obligation to disclose relating to any drug subject to an abbreviated drug application. 21 USC § 335(b).

The federal government has determined that the maximum criminal penalty appropriate for mislabelling prescription drugs is $10,000, and the maximum civil penalty appropriate for misrepresentations related to drugs subject to an abbreviated drug application is $1 million. The punitive damages awarded to Edwards are *more than 22 times* the maximum civil penalty to which Key could be subjected for the conduct allegedly involved here. Plaintiff's punitive damages are *35 times* that penalty and the combined award exceeds the potential civil penalty by *57 times*. Edwards' punitive damages were *2250 times* the maximum criminal fine; Plaintiff's were *3500 times*; and the total punitive damage award in this case is *5750 times* the maximum criminal fine. Certainly, none of the penalties provided by federal law for the conduct alleged against Key in this case provide fair notice that mislabelling or inappropriately promoting a prescription drug might subject a manufacturer to a total penalty of over $57 million in a civil case.

The United States Supreme Court decision in the *BMW* case highlights the excessiveness of the punitive damages awarded to both Respondents in this case. Both punitive damages awards should be overturned.

b. The Punitive Damages Awards Are Unconstitutionally Excessive in Relation to the State's Legitimate Interests in Punishing Key's Conduct.

In its opening brief, Key raised the issue of whether the punitive damages awarded here violated Due Process because they punish Key for conduct which occurred outside the jurisdiction. Key's Br. at 115, n 57, citing *BMW of North America Inc. v Gore*, 646 So 2d 619 (Ala 1994), *cert granted* ___ US ___, 115 S Ct 932, 130 L Ed 2d 879 (1995). The United States Supreme Court's recent opinion affirmed the constitutional principle that punitive damages may properly be imposed only to further a State's own legitimate interests in punishing unlawful conduct and deterring its repetition.

With this principle in mind, the Supreme Court begins the "federal excessiveness" inquiry with an identification of the state interests that a punitive award is designed to serve. Said another way, the Court first measures the "scope of [the State's] legitimate interests in punishing [a defendant] and deterring it from future misconduct." *BMW*, ___ US ___, 116 S Ct at 1595. In the context of the facts before it, the Supreme Court notes:

> "We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States * * * [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of
>
> * * *

RATIO OF COMPENSATORY TO PUNITIVE AWARDS

IN OREGON POST OBERG V. HONDA, 512 U.S. 415 (1995)

Date	Case Name	Compensatory	Punitive	Court of Appeal Award	Ratio
June 5, 2002	Williams v. Philip Morris, Inc. 48 P.3d 824 182 Or.App. 44	821,486	$79.5 million	reinstated jury award after trial court had remitted to $32 million	97:1
July 11, 2001	Waddil v. Anchor Hocking, Inc. 27 P.3d 1092 175 Or.App. 294	$100,854	$1 million	upheld	10:1
Jan 11, 2001	Parrot v. Carr Chev. Inc. 17 P.3d 473 331 Or. 537	$11,496	$1 million	$300,000 Ct. App. award vacated, $1 million reinstated	87:1
Sept. 27, 2000	Jensen v. Medley 11 P.3d 678 170 Or.App. 42	$35,000	$1.25 million	remitted to $175,000 by Ct. App.	5:1
July 12, 2000	Cantua v. Creager 7 P.3d 693 169 Or.App. 81	$500	$10,000	upheld	20:1
April 28, 1999	MacCrone v. Edwards Center, Inc. 980 P.2d 1156 160 Or.App. 91	$275,000	$1.25 million	reinstated jury award after trial court had remitted to $1 million	4.5:1
March 17, 1999	Kraemer v. Harding 976 P.2d 1160 159 Or.App. 90	$132,887	$75,000	upheld	.6 :1
February 10, 1999	Axen v. American Home Prod. Corp. 974 P.2d 224 158 Or.App. 292	$2,407,265	$20 million	upheld	8.3:1
September 30, 1998	Parrott v. Carr Chevrolet, Inc. 965 P.2d 440 156 Or.App. 257	$11,496	$1 million	$300,000 award after trial court had remitted to $50,000	26:1
July 15, 1998	Blume v. Fred Meyer, Inc. 963 P.2d 700 155 Or.App. 102	$25,000	$450,000	upheld	18:1
April 22, 1998	Purcell v. Asbestos Corp., Ltd. 959 P.2d 89 153 Or.App. 415	$1,807,000	$3 million	upheld	1.7:1
April 30, 1997	Northwest Natural Gas Co. v. Chase Gardens, Inc. 938 P.2d 778 147 Or.App. 586	$2,151,226	$3 million	upheld	1.4:1
October 9, 1996	Lakin v. Senco Prod., Inc. 925 P.2d 107 144 Or.App. 52	$6,199,413	$4 million	upheld (affirmed by Oregon Supreme Court)	.6:1
		Other Cases			
February 17, 1999	Bocci v. Key Pharmaceuticals, Inc. 974 P.2d 758 158 Or.App. 521	$500,000	$22.5 million	upheld: not precedential since equally split decision	45:1
April 22, 1998	Stranahan v. Fred Meyer, Inc. 11 P.3d 228 331 Or. 38	$125,000	$2 million	reinstated jury award after trial court had remitted to $375,000: reversed on other grounds by S. Ct.	16:1

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App. 118

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IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

PAUL R. BOCCI, JR., Guardian ad Litem for PAUL R. BOCCI, III, an incapacitated individual, Plaintiff, v. KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation; SCHERING CORPORATION, a foreign corporation; MILES, INC. an Indiana corporation; LEGACY HEALTH SYSTEM, an Oregon corporation; LEGACY IMMEDIATE CARE CLINIC; FREDERICK D. EDWARDS, M.D.; and THE EUGENE CLINIC, a partnership, Defendants. FREDERICK D. EDWARDS, M.D., Cross-Claim Plaintiff, v. KEY PHARMACEUTICALS, INC., a foreign corporation;	Case No. 9210-07050 JUDGMENT (Filed Sept. 9, 1994)

SCHERING-PLOUGH CORPORATION, a foreign corporation; SCHERING CORPORATION, a foreign corporation,

Cross-Claim Defendants.

This matter came on for trial before the Honorable William C. Snouffer on August 8, 1994. Plaintiff was represented by Paul Luvera, James Holman and Mark Bocci. Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation and Schering Corporation were represented by J.P. Garnier, Michael Garnier, and Stephen F. English. Defendant Feredrick [sic] D. Edwards and the Eugene Clinic were represented by Dan Holland and Joel Cunningham.

Plaintiff entered into a covenant not to sue pursuant to ORS 18.455 with Legacy Health System and Legacy Immediate Care Clinic in the amount of $50,000. Plaintiff also entered into a covenant not to sue pursuant to ORS 18.455 with Frederick D. Edwards, M.D., and the Eugene Clinic in the amount of $200,000

Plaintiff moved to dismiss his claims against Defendant Miles, Inc. with prejudice, and that motion was granted.

Plaintiff moved to dismiss his claims against Legacy Health Systems and Legacy Immediate Care Clinic with prejudice, and that motion was granted.

On August 29, 1994, during trial, Plaintiff moved to dismiss his claims against Defendants Frederick Edwards,

M.D. and the Eugene Clinic without prejudice, and that motion was granted.

Trial commenced on August 8, 1994. Following the presentation of evidence, the jury was duly instructed and on September 2, 1994, returned its verdict as follows:

> We, the jury, find:
>
> 1. Were the defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation, and Schering Corporation at fault in one or more of the ways alleged in the Plaintiff's complaint, and, if so, was such fault a cause of damage to the Plaintiff Paul R. Bocci, III?
>
> ANSWER: yes (yes or no)
>
> If your answer to question 1 is "no," your verdict is for the defendants Key, Schering-Plough, and Schering. Your presiding juror should sign this verdict form. Do not answer any more questions.
>
> If your answer to question 1 is "yes," proceed to question 2.
>
> 2. Was the Plaintiff Paul R. Bocci, III at fault in one or more of the ways alleged in defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation, and Schering Corporation's answer and affirmative defense, and, if so, was such fault a cause of damage to the Plaintiff Paul R. Bocci, III?
>
> ANSWER: yes (yes or no)
>
> At least the same nine of you who answered "yes" to question 1 must agree on the answer to question 2 if the answer to question 2 is "Yes."
>
> If your answer to question 2 is "no," proceed to question 4. Do not answer question 3.

If your answer to question 2 is "yes," proceed to question 3.

3. What is the percentage of each of the parties' fault which caused damage to the Plaintiff Paul R. Bocci, III?

ANSWER: Defendants Key Pharmaceuticals, Inc. Schering-Plough Corporation and/or Schering Corporation 65 %

Plaintiff, Paul R. Bocci, Jr. 35 %

(The percentages must total 100%)

At least the same nine of you who answered "yes" to questions 1 and 2 must agree on the answer to question 3.

If the Plaintiff Paul R. Bocci, III's percentage of fault is greater than the percentage of fault of defendants Key, Schering-Plough, and Schering, your verdict is for defendants. Your Presiding Juror should sign this verdict form. Do not answer any more questions.

If the Plaintiff Paul R. Bocci, III's percentage of fault is equal to or less than the percentage of fault of defendants, proceed to question 4.

4. What are the Plaintiff Paul R. Bocci, III's compensatory damages?

ANSWER:

Economic Damages $1,605,805
(may not exceed $3,485, 818.29)

Noneconomic Damages $7,427,500
(may not exceed $10 million)

At least the same nine of you who answered "yes" to any of questions 1 and 2, and who also agreed on the

answer to question 3 if 3 was answered, must agree on the answer to question 4.

Do not reduce the damages by the Plaintiff Paul R. Bocci, III's percentage, if any, because the court will do this when entering judgment.

If you answered question 4, proceed to question 5.

5. Has Plaintiff Paul R. Bocci, III shown by clear and convincing evidence that the Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation, and Schering Corporation in [sic] acted with wanton disregard for the health, safety, and welfare of others?

ANSWER: yes (yes or no)

At least the same nine of you who answered "yes" to any of questions 1 and 2, and who also agreed on the answers to question 3 if 3 was answered, and question 4, must agree on the answer to 5.

If your answer to 5 was "yes," proceed to question 6. If your answer to question 5 was "no," your Presiding Juror should sign this verdict form. Do not answer any more questions.

6. Has Plaintiff Paul R. Bocci, III shown by clear and convincing evidence that defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation, and Schering Corporation, in violation of applicable FDA regulations, knowingly withheld from or misrepresented to the FDA or prescribing physician information known to be material and relevant to the harm that plaintiff allegedly suffered?

Answer: yes (yes or no)

At least the same nine of you who answered "yes" to questions 1 and 2, and who also agreed on the answers

to question 3 if 3 was answered, and questions 4 and 5, must agree on the answer to 6.

If your answer to question 6 was "yes," proceed to question 7. If your answer to question 6 was "no," your Presiding Juror should sign this verdict form. Do not answer any more questions.

7. What are the Plaintiff Paul R. Bocci, III's punitive damages?

Answer: $ 35 million (This amount may not exceed $35 million)

Following the verdict, the jury was polled and nine members of the jury agreed to the verdict. Now, therefore,

IT IS HEREBY ORDERED AND ADJUDGED that the economic and noneconomic damages as found by the jury are reduced by 35%, the percentage of fault assigned to Plaintiff, from $1,605,805 and $7,427,500, respectively, to $1,043,773.20 and $4,827,875, respectively;

IT IS FURTHER ORDERED AND ADJUDGED that the Department of Justice, State of Oregon, is a judgment creditor pursuant to ORS 18.540 in an amount equal to one-half of the punitive damages awarded to Plaintiff after payment of attorney fees;

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's claims against Miles, Inc. are dismissed with prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's claims against Legacy Health System and Legacy Immediate Care Clinic are dismissed with prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's claims against Frederick Edwards, M.D. and The Eugene Clinic are dismissed without prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's compensatory damages are reduced by $250,000 pursuant to ORS 18.455;

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall have judgment against Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation and Schering Corporation in the amount of $5,621,648.20 in compensatory damages and $35 million in punitive damages, and that Plaintiff shall have Judgment against Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation and Schering Corporation for his costs and disbursements herein, to be determined pursuant to ORCP 68.

SUMMARY OF MONEY JUDGMENT

1. Name of Judgment Creditor:	A) Paul R. Bocci, Jr., Guardian ad litem for Paul R. Bocci III, an incapacitated individual
	B Department of Justice, State of Oregon
2. Names of Judgment Creditors Attorney:	A) Paul Luvera James Holman Mark R. Bocci
	B) Theodore Kulongoski, Attorney General, State of Oregon

3. Names of Judgment Debtors:	Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation and Schering Corporation
4. Principal Amount of Judgment	$40,621,648.20
5. Interest Owed to Date	0
6. Costs and Disbursements	To be determined pursuant to ORCP 68
7. Post-Judgment Interest	Simple interest at the rate of 9% per annum on items 4 and 6 from the date of entry of judgment until paid

Dated this 9 day of September, 1994.

/s/ Snouffer
WILLIAM C. SNOUFFER
(Circuit Court Judge)

H:\CLIENTS\9673\1\PLDGS\JUDGMENT.1

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

FREDERICK D. EDWARDS, M.D., Plaintiff, vs. KEY PHARMACEUTICALS, INC., a foreign corporation, SCHERING-PLOUGH CORPORATION, a foreign corporation, and SCHERING CORPORATION, a foreign corporation, Defendants.	Case No. 9210-07050 JUDGMENT ON VERDICT (Filed Sep. 9, 1994)

This matter came on for trial beginning on the 8th day of August, 1994 before the Honorable William C. Snouffer, Circuit Court Judge. Plaintiff Dr. Edwards was represented by Daniel Holland Joel Cunningham; Plaintiff Paul Bocci III was represented by Paul Luvera, James Holman and Mark Bocci; and Defendants were represented by J.P. Garnier, Michael Garnier and Steven English. On the 1st day of September, 1994, the jury returned its verdict finding in favor of Plaintiff Frederick D. Edwards, M.D. and against Defendants Key Pharmaceuticals, Inc., a foreign corporation, Schering-Plough Corporation, a foreign corporation, and Schering Corporation, a foreign corporation as follows:

"We the jury find:

1. Were Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation and Schering Corporation negligent in one or more of the ways alleged by Plaintiff Dr. Edwards and, if so, was

such negligence a cause of damage to Dr. Edwards?

ANSWER: yes (yes or no)

Proceed to question 2.

2. Was Plaintiff Dr. Edwards negligent in one or more of the ways alleged by Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation and Schering Corporation and, if so, was such negligence a cause of damage to Dr. Edwards?

ANSWER: no (yes or no)

At least nine of you who agreed on your answer to question 1 must also agree on your answer to question 2. Go to question 3.

3. Did Defendants Key Pharmaceuticals, Inc., Schering-Plough Corporation and Schering Corporation make fraudulent misrepresentations in one or more of the ways alleged by Plaintiff Dr. Edwards and, if so, were such fraudulent misrepresentations a cause of damage to Dr. Edwards?

ANSWER: yes (yes or no)

The same nine of you who agreed on your answers to questions 1 or 2 must also agree on the answer to question 3.

If you answered questions 1, 2 and 3 "yes," proceed to question 4. If you answered questions 1 and 3 "no," you should answer no further questions; the Presiding Juror should sign the verdict.

4. What is the percentage of each party's fault which caused damage to Dr. Edwards?

ANSWER: Defendants Key, Schering-Plough and Schering Corporation: 100%
Plaintiff Dr. Edwards: 0%
(The percentages must total 100%)

At least nine of you who agreed on your answers to previous questions must also agree on your answer to question 4. Proceed to question 5.

5. What are Plaintiff Dr. Edwards' non-economic damages?

ANSWER: $500,000.00
(This amount may not exceed $2 million)

Proceed to question 6.

6. Has Plaintiff Dr. Edwards shown by clear and convincing evidence that Defendants Key, Schering-Plough and Schering acted with wanton disregard for the health, safety and welfare of others sufficiently to justify an award of punitive damages?

ANSWER: yes (yes or no)

At least the same nine of you who agreed on the answers to previous questions must also agree on your answer to question 6. Proceed to question 7.

7. Has Plaintiff Dr. Edwards shown by clear and convincing evidence that Defendants Key, Schering-Plough and Schering, in violation of applicable FDA regulations, knowingly withheld from or misrepresented to the FDA or prescribing physician information known to be material and relevant to the harm that plaintiff allegedly suffered?

ANSWER: yes (yes or no)

At least the same nine of you who agreed on your answers to the previous questions must also agree on your answer to this question.

If you have answered both questions 6 and 7 "yes" proceed to question 8. If you have answered either question 6 or 7 "no," you should answer no further questions and the presiding juror should sign this verdict form.

8. What are Plaintiff Dr. Edwards' punitive damages?

ANSWER: $22.5 million
(This amount may not exceed the sum of $35 million.)

Date: September 1, 1994 /s/ Julia Kutler
Presiding Juror"

The Court having duly reviewed and considered the verdict,

IT IS HEREBY ORDERED AND ADJUDGED that the verdict is in proper form and is received;

IT IS FURTHER ORDERED AND ADJUDGED that the Department of Justice, State of Oregon, is a judgment creditor pursuant to ORS 18.540 in an amount equal to one-half the punitive damages awarded after payment of attorney fees; and

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff Frederick D. Edwards, M.D. have and recover judgment against Defendants Key Pharmaceuticals, Inc., a foreign corporation, Schering-Plough Corporation, a foreign corporation, and Schering Corporation, a foreign corporation, for $500,000 in noneconomic damages and $22,500,000.00 in punitive damages; and that Plaintiff shall have judgment

for his costs and disbursements incurred herein in an amount to be determined pursuant to ORCP 68.

The following summary is provided pursuant to ORCP 70A:

MONEY JUDGMENT SUMMARY

1. Judgment Creditor for all damagers, costs and disbursements except that portion of the award to which the Criminal Injuries Compensation Account is entitled to pursuant to ORS 18.540:

   Frederick D. Edwards, M.D.

2. Judgment Creditor for that portion of the award to which the Criminal Injuries Compensation Account is entitled to pursuant to ORS 18.540:

   Department of Justice
   State of Oregon

3. Judgment Creditors' Attorneys
   Dr. Edwards:

   Daniel M. Holland
   801 East Park Street
   Eugene, Oregon 97401

   Joel C. Cunningham
   Williams, Kastner & Gibbs
   Two Union Square
   601 Union Street, Suite 4100
   Seattle, Washington 98101-2380

   Judgment Creditors' Attorney:
   For Department of Justice:

   Theodore Kulongoski
   Oregon Attorney General
   Justice Building

Salem, Oregon 97310

4. Judgment Debtors: Key Pharmaceuticals, Inc., a foreign corporation; Schering-Plough Corporation, a foreign corporation; and Schering Corporation, a foreign corporation

5. Judgment Amount (Principal):

Non-Economic Damages:	$ 500,000.00
Punitive Damages:	$22,500,000.00

6. The money judgment also includes an award of costs and disbursements in an amount to be determined pursuant to ORCP 68C.

7. There is no prejudgment interest owing.

8. Post-judgment simple interest shall accrue at the rate of nine percent (9%) per annum on the total judgment which consists of items 5 plus 6, from the date this judgment is entered until fully paid.

DATED this 9 day of September, 1994.

/s/ Snouffer
William C. Snouffer
Circuit Court Judge

Submitted by:

Daniel M. Holland, OSB 80056
LOOMIS & HOLLAND
Attorneys for Plaintiff Dr. Edwards

17 P.3d 473

Supreme Court of Oregon.

Mark PARROTT, Petitioner on Review,
and
Charles Forshey, Plaintiff,

v.

CARR CHEVROLET, INC., an Oregon corporation, Respondent on Review. Mark Parrott, Respondent on Review,

and

Charles Forshey, Plaintiff,

v.

Carr Chevrolet, Inc., an Oregon corporation, Petitioner on Review.

(CC C93-0873CV; CA A88512; SC S45916, S45917)

Argued and Submitted Sept. 8, 1999.
Decided Jan. 11, 2001.

On review from the Court of Appeals.*

Kathryn H. Clarke, Portland, argued the cause for petitioner-cross respondent on review Parrott. With her on the briefs were Maureen Leonard and Michael C. Baxter, Portland.

Barbee B. Lyon, of Tonkon Torp LLP, Portland, argued the cause and filed the briefs for respondent-cross petitioner on review Carr Chevrolet, Inc.

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* Appeal from Washington County Circuit Court, Michael J. McElligott, Judge. 156 Or.App. 257, 965 P.2d 440 (1998).

Megan A. Flynn and Kevin Keaney, Portland, and James S. Coon, of Swanson, Thomas & Coon, Portland, filed briefs on behalf of amicus curiae Oregon Trial Lawyers Association.

Craig A. Nichols, of Nichols & Associates, Portland, filed a brief on behalf of amicus curiae Oregon Automobile Dealers Association.

Before CARSON, Chief Justice, and DURHAM, KULONGOSKI, and LEESON, Justices.**

KULONGOSKI, J.

Parrott (plaintiff)[1] brought this civil action against Carr Chevrolet, Inc. (defendant), arising from defendant's sale of a used 1983 Chevrolet Suburban to plaintiff. Plaintiff alleged, *inter alia,* that defendant had violated certain provisions of the Unlawful Trade Practices Act (UTPA), ORS 646.608(1)(e), (g), and (t).[2] The jury returned

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** Gillette, Riggs, and De Muniz JJ., did not participate in the consideration or decision of this case. Van Hoomissen, J., retired on December 31, 2000, and did not participate in the consideration or decision of this case.

[1] After plaintiffs Parrott and Forshey presented their case-in-chief, the trial court directed a verdict in defendant's favor on all claims that plaintiff Forshey had asserted. Forshey is not a party to the appeal or review.

[2] ORS 646.608(1) provides, in part: "A person engages in an unlawful practice when in the course of the person's business, vocation or occupation the person does any of the following:

"* * *

"(e) Represents that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that they do not have * * *.

"* * *

(Continued on following page)

a verdict in plaintiff's favor and awarded $11,496 in compensatory damages and $1 million in punitive damages. After the verdict, defendant filed motions for a Judgment Notwithstanding the Verdict (JNOV) under Oregon Rule of Civil Procedure (ORCP) 63 or, in the alternative, for a new trial under ORCP 63 C and ORCP 64. One of the grounds that defendant asserted in support of its motion for a new trial was that the jury's punitive damages award was excessive. Although the trial court denied defendant's JNOV and new-trial motions, it ruled that the punitive damages award was excessive and reduced it to $50,000. The trial court then entered judgment for plaintiff in the amount of $11,496 in actual damages and $50,000 in punitive damages. The trial court also rejected plaintiff's attorney fees request for $55,468.75, awarding, instead, fees of $15,000. Both plaintiff and defendant appealed.

On appeal, plaintiff assigned error to the trial court's reduction of the punitive damages award from $1 million to $50,000 and to the trial court's rejection of plaintiff's attorney fees request. Defendant cross-appealed, contending, generally, that plaintiff had failed to state a claim under the UTPA, that the trial court had erred in awarding *any* punitive damages, and that the trial court's

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"(g) Represents that real estate, goods or services are of a particular standard, quality, or grade, or that real estate or goods are of a particular style or model, if they are of another.

"* * *

"(t) Concurrent with tender or delivery of any real estate, goods or services fails to disclose any known material defect or material nonconformity."

$50,000 punitive damages award was excessive. The Court of Appeals affirmed on defendant's cross-appeal. On plaintiff's appeal, it reversed the trial court's reduction of the jury's punitive damages award and remanded with instructions to enter judgment allowing defendant's motion for new trial unless plaintiff filed a remittitur of punitive damages in the amount of $300,000. *Parrott v. Carr Chevrolet, Inc.*, 156 Or.App. 257, 965 P.2d 440 (1998).[3] Both parties petitioned for review, challenging the Court of Appeals' analysis in its review of the punitive damages award and whether the punitive damages award was unconstitutionally excessive.[4] We allowed both petitions.

The primary issue on review is the appropriate standard for post-verdict judicial review of a punitive damages award in Oregon in light of *BMW of North*

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[3] The Court of Appeals also reversed the trial court's award of attorney fees and held that the trial court had abused its discretion when it awarded plaintiff's counsel $15,000, rather than the $55,468.75 that counsel had requested. *Parrott*, 156 Or.App. at 282, 965 P.2d 440.

In its brief on the merits, defendant asks this court to reverse the Court of Appeals on that issue and to "restore the trial court's award of attorney fees." Defendant, however, did not raise that issue in its petition for review. Because of that omission, we decline to consider the issue and express no opinion on its merits. *See* ORAP 9.17(2)(b)(i) (brief on merits may not raise additional questions or change substance of questions already presented in petition for review); ORAP 9.20(2) (Supreme Court *may* review issue raised in Court of Appeals but not presented on review). *See, e.g., Stupek v. Wyle Laboratories Corp.*, 327 Or. 433, 437, 963 P.2d 678 (1998) ("Although, under ORAP 9.20(2), this court may review an issue that properly was raised on appeal and preserved, but not presented on review, we ordinarily will not do so unless the issue requires resolution.").

[4] Defendant raised only one additional issue in its petition for review: Whether, in light of ORS 72.3160(3)(a) (allowing "as is" sales), plaintiff failed to state a claim under the UTPA.

America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). For the reasons that follow, we hold that the rational juror inquiry in *Oberg v. Honda Motor Co.,* 320 Or. 544, 888 P.2d 8, *cert. den.* 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996) (*Oberg* (state)),[5] remains the standard of post-verdict judicial review of punitive damages in Oregon for excessiveness under the federal constitution and that *Gore's* set of nonexclusive guideposts are factors that the reviewing court should consider as part of the *Oberg* (state) review. Applying the *Oberg* (state) standard and the *Gore* guideposts to the record before the jury in this proceeding, we hold that the jury's $1 million award of punitive damages is within the range that a rational juror would be entitled to award.

The following facts are taken from the record. We view the evidence, and the reasonable inferences to be drawn therefrom, in the light most favorable to plaintiff, the party in whose favor the jury returned the verdict. *Northwest Natural Gas Co. v. Chase Gardens, Inc.,* 328 Or. 487, 490, 982 P.2d 1117 (1999).

Defendant operated a budget lot for used vehicles advertised as "quality checked used cars." The vehicles on that lot were sold "as is" and had been driven at least 100,000 miles. In December 1992, defendant acquired a

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[5] The *Oberg v. Honda Motor Co.* case resulted in two opinions from this court and one from the United States Supreme Court. For purposes of our discussion, only two of those decisions are relevant: the Supreme Court's opinion in *Honda Motor Co. v. Oberg,* 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), which we refer to as *Oberg* (federal); and the final opinion issued by this court, *Oberg v. Honda Motor Co.,* 320 Or. 544, 888 P.2d 8, *cert. den.* 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996), which we refer to as *Oberg* (state).

1983 Suburban as a trade-in from Myers. Defendant sent the Suburban to the budget lot, priced at $5,995. Two weeks after defendant had acquired the Suburban, plaintiff went to defendant's budget lot in search of a three-quarter ton truck. A salesperson directed him to the Suburban. After examining the Suburban, plaintiff noticed that someone had polished, cleaned and serviced it, and that the radiator, batteries, tires, and upholstery looked new. The engine was painted blue, and plaintiff assumed that it had been replaced. He commented: "It looks like quite a lot of recent work was done on this vehicle," to which the salesperson replied, "[y]eah." Plaintiff also noticed that the Suburban's air cleaner was missing, but the salesperson assured him that defendant would replace it.

The following week, plaintiff purchased the Suburban. After trading in his two vehicles as a down payment toward the purchase price of the Suburban, plaintiff signed a credit agreement through defendant for the balance of the Suburban's purchase price, $2,892.17. Plaintiff also signed the sales documents to complete the transaction, which included a "Special Disclaimers and Conditions" form and a "Buyer's Order."

Included in the Special Disclaimers and Conditions form was a section stating that the dealership visually had inspected the vehicle and that there were no apparent deficiencies in the installation of emission control devices. When plaintiff pointed out that that statement was inconsistent with the missing air cleaner, defendant gave him a "we owe" statement for that missing piece of equipment. The Buyer's Order, in contrast, included a typewritten section stating that the dealership had not inspected the vehicle and had no knowledge of the vehicle's condition, the

accuracy of the odometer, or Department of Environmental Quality (DEQ) certification. After he had completed all the paperwork, plaintiff drove the Suburban home.

Shortly thereafter, plaintiff discovered multiple problems with the Suburban, including several missing pieces of emission control equipment, not only the air cleaner.[6] Through his own investigation, plaintiff also discovered that it was impossible to bring the Suburban into DEQ compliance because of the missing equipment and a difference in age between the Suburban and its engine. Plaintiff noticed that the Vehicle Identification Number (VIN) located on the door, which should have matched with the VIN in the glove box, had been removed. He also noticed that there were white lines between the numbers on the odometer. Plaintiff conducted his own title search and learned through the Department of Transportation, Driver and Motor Vehicle Services (DMV), that the Suburban previously had been damaged in California and that it had a "title brand," which meant that the Suburban's title had a notation indicating that it had been damaged severely, totaled, or stolen. Once plaintiff's insurer learned about the branded title, it no longer would provide comprehensive insurance for the Suburban.

When plaintiff complained to defendant, defendant's employees told plaintiff that repair was his problem because he had purchased the Suburban "as is." They also told him that the Suburban's engine did not require DEQ

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[6] One of plaintiff's expert witnesses testified that the emission control equipment missing from the Suburban included an air cleaner, an exhaust gas recirculation system, and an air pump.

equipment and that, regardless of that fact, he should not worry about DEQ compliance, because the registration was valid for another two years. At one point, a salesperson told plaintiff that defendant would replace the engine, but with junkyard parts. Ultimately, negotiations between plaintiff and defendant for a replacement vehicle failed when one of defendant's salespeople yelled at plaintiff, telling him that the Suburban was "unfixable" and that he would have to "learn to live with it" unless he agreed to a refund of $3,100 – an amount equivalent to his down payment but that did not include reimbursement for the value of his trade-ins or his loan and insurance fees. Negotiations between plaintiff and defendant's attorney for rescission of the transaction also failed.

As a result, plaintiff filed this action against defendant, alleging, among other things, that defendant had violated the UTPA by willfully selling the Suburban:

> "1) Falsely claiming it was equipped with proper emission controls;
>
> "2) Falsely representing it had been driven 100,608 miles;
>
> "3) With defaced or missing VIN numbers in violation of Oregon law;
>
> "4) Without disclosing that the emission control equipment had been removed; and
>
> "5) Selling the vehicle without disclosing it had previous out of state damage."

At trial, plaintiff proved that defendant had known about the condition of the Suburban when defendant sold it to plaintiff. When defendant had acquired the Suburban as a trade-in from Myers, Myers had provided defendant

with a temporary registration form as proof of ownership. It was clear from examining Myers's temporary registration form that someone had altered it in an attempt to conceal that it had expired. Plaintiff's experts testified that no used car dealership would accept the expired document as proof of ownership without confirmation from DMV. The Monday after Myers had brought the Suburban to defendant, someone had requested and received a Basic Vehicle Information sheet from a DMV field office. That document confirmed that Myers was the registered owner of the Suburban, that the Suburban had an odometer discrepancy, and that the Suburban had received "out-of-state damage – CA."

Preble, co-owner and chairman of the board of Carr Chevrolet, acknowledged at trial that, as proof of ownership, Myers's temporary registration form was a "flimsy document" and that, consequently, defendant had asked Myers to sign a "Secure Power of Attorney." A Secure Power of Attorney is a DMV form that dealers use when the owner of a vehicle has lost a title or the title is in the possession of a security interest holder. The form authorized defendant to transfer title from Myers to the new owner, in this case, plaintiff. One purpose of the form is to protect customers, like plaintiff, from an odometer discrepancy. Although Myers had filled out Part A of the Secure Power of Attorney, defendant never completed Parts B and C. Had defendant completed the Secure Power of Attorney when it sold the Suburban to plaintiff, plaintiff would have learned about the odometer discrepancy before completing the transaction.

In addition to the Secure Power of Attorney, Myers also had filled out, albeit incompletely, a "Secure Odometer Disclosure/Reassignment" form for his trade-in vehicles.

Plaintiff's expert testified that the only reason that a dealership would fill out both a Secure Power of Attorney and an incomplete Secure Odometer Disclosure/ Reassignment form for the same vehicle was so that it could "try to sell [the vehicle] at a later date without proper disclosure of the mileage." Plaintiff's evidence demonstrated that the incorrect use of title transfer forms was a regular part of defendant's business practice. For its part, defendant acknowledged that it routinely asked customers to sign blank, undated, or otherwise incomplete title transfer forms, but it denied that it used incorrect, extra, or incomplete forms for any wrongful purpose.

When plaintiff purchased the Suburban, defendant had represented to plaintiff that it had possession of the Suburban's title, when, in fact, it had only Myers's expired temporary registration. Defendant subsequently obtained the replacement title that stated that the odometer reading "exceed[ed] mechanical limits" and that the car had received "previous damage-California." However, defendant did not disclose that information to plaintiff. When completing the documents to transfer title from Myers to plaintiff, defendant's title clerk had failed to notice that the mileage indicated on the front of the title, 107,497 miles as of July 1992, was greater than defendant's odometer reading when it acquired the Suburban from Myers, 100,608 miles as of December 1992. She testified that defendant had not trained her to check for such a discrepancy and that she never had done so. Referring to the discrepancy between the odometer statements on the front and back of the replacement title, Preble testified: "We would have been as alarmed as you were, had we paid attention to that fact." Claiming ignorance of DMV vehicle transfer requirements, Preble declined to identify anyone

in the company with sufficient knowledge and authority to be responsible for what had happened, stating: "Our management style doesn't cause us to have final authority [for that] type of thing. That's not the style of management we have."

Defendant claimed that it had no knowledge of the Suburban's physical and mechanical defects before selling the Suburban to plaintiff and was equivocal about whether it had inspected the Suburban when it accepted it in trade. Defendant ultimately conceded, however, that, to accept the Suburban in trade, defendant had appraised it and performed a "minimal" inspection as part of that appraisal. Defendant's used car manager testified that a "minimal" inspection included a visual inspection of the physical condition of the Suburban, including the body, paint, glass, upholstery, and carpet, a check of specific equipment on the Suburban, such as the transmission and brakes, and a test drive of the Suburban "to make sure that the engine runs [and that] the transmission shifts."

Plaintiff's experts testified that, even without a detailed inspection of the Suburban, any minimally trained dealership employee would have recognized the following "red flags" indicating that someone had "altered" the Suburban: (1) the driver's door was misaligned and was a different color; (2) the VIN was missing from the door and from the transmission; (3) several pieces of the emission control equipment were missing; (4) the engine was not the original engine that had come with the Suburban; and (5) "very visible" white lines were present between the odometer numbers – a clear indication that someone had tampered with the odometer and, therefore, that the mileage indicated likely was inaccurate. One of plaintiff's experts opined that there was "no question"

that defendant knew that the mileage on the Suburban was not accurate, that the VIN had been removed, and that the Suburban was missing its emission control equipment and could not pass DEQ inspection.

As noted, the jury found for plaintiff on his UTPA claim, awarding him compensatory and punitive damages. Defendant challenged the jury's award of punitive damages on several grounds, including excessiveness under the Fourteenth Amendment to the United States Constitution.[7] The trial court noted that the record supported what was "an extraordinarily egregious violation" of the UTPA, but, on defendant's motion for elimination or reduction of the punitive damages award, lowered plaintiff's punitive damages award to $50,000, finding that $50,000 "is the number which is the top of the range which * * * a rational factfinder could award on this * * * record."

On appeal, the Court of Appeals followed *Blume v. Fred Meyer, Inc.*, 155 Or.App. 102, 963 P.2d 700 (1998), which held that, after *Gore*, the *Oberg* (state) rational juror standard for post-verdict judicial review of punitive damages for excessiveness under the federal constitution no longer is applicable. *Parrott*, 156 Or.App. at 274-75, 965 P.2d 440. Both defendant and plaintiff petitioned for review, seeking clarification of the appropriate standard for post-verdict judicial review of a punitive damages

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[7] The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

award in Oregon in light of *Gore*. We allowed review to consider that issue.

Before we reach that issue, however, we turn to the additional issue raised in defendant's petition for review, which is whether, in light of ORS 72.3160(3)(a), which permits "as is" sales, plaintiff failed to state a claim under ORS 646.608(1)(t).[8] We have considered and, for the reasons explained by the Court of Appeals, *Parrott*, 156 Or.App. at 270-71, 965 P.2d 440, reject without additional discussion defendant's arguments relating to that issue.

We turn, then, to the primary issue on review: What is the appropriate standard of post-verdict judicial review of a punitive damages award in Oregon following *Gore?* In *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) (*Oberg* (federal)), the United States Supreme Court held that the Due Process Clause requires the availability of post-verdict judicial review of punitive damages awards. In that opinion, however, the Court did not "address the more difficult question of what standard of review is constitutionally required." *Id.* at 432 n. 10, 114 S.Ct. 2331. On remand, this court held:

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[8] In its petition for review, defendant presented the court with three issues, two of which concerned review of punitive damages awards for excessiveness under the Fourteenth Amendment, and one of which concerned reconciliation of ORS 72.3160(3)(a) and ORS 646.608(1)(t). In its brief on the merits, however, defendant presented several additional issues, one of which concerned the sufficiency of the evidence to support the jury's findings that defendant violated the UTPA. We did not allow review of defendant's petition on that issue. Therefore, we decline to consider it and express no opinion on its merits. ORAP 9.17(2)(b)(i); ORAP 9.20(2). *See* 331 Or. 541 n. 3, 17 P.3d 477 n. 3.

> "[T]he standard for post-verdict judicial review of an award of punitive damages is as follows: A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue."

Oberg (state), 320 Or. at 549, 888 P.2d 8 (footnote omitted).

Approximately one year after this court's decision in *Oberg* (state), the United States Supreme Court in *Gore* decided to address the question it previously had left unanswered in *Oberg* (federal) and "illuminate the character of the standard that will identify unconstitutionally excessive awards of punitive damages[.]" 517 U.S. at 568, 116 S.Ct. 1589 (internal quotation marks omitted). The plaintiff in *Gore* filed an action against BMW for fraud after he discovered that BMW had failed to disclose that his new automobile had been repainted due to damage during delivery. The jury awarded the plaintiff $4,000 in compensatory damages and $4 million in punitive damages. The trial court denied BMW's post-trial motion to set aside the punitive damages award, holding, among other things, that the award was not excessive. On appeal, the Alabama Supreme Court applied its state law criteria for judicial review (previously endorsed by the Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 21-22, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)), and concluded that the jury's punitive damages award did not exceed the constitutionally permissible amount. The Alabama Supreme Court, however, reduced that award to $2 million, because it found that the jury improperly had

computed the amount of punitive damages by multiplying the plaintiff's compensatory damages by the number of similar sales in jurisdictions other than Alabama.

The United States Supreme Court reversed. *Gore,* 517 U.S. at 586, 116 S.Ct. 1589. Although the Court acknowledged the legitimacy of a state's interests in "punishing unlawful conduct and deterring its repetition" through punitive damages awards, it emphasized that the Due Process Clause prohibits states from imposing "grossly excessive" punishment on a tortfeasor. *Id.* at 568, 116 S.Ct. 1589 (*citing TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 456, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)). The Court explained that an award that the Court can characterize as "grossly excessive" in relation to the state's interests is one that is arbitrary and, therefore, violates due process. *Id.* Accordingly, review of a punitive damages award for excessiveness begins with identification of the state interests that a punitive damages award is designed to serve. *Id.*

The Court also held that "a person [must] receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574, 116 S.Ct. 1589. The Court identified three "guideposts" to consider when evaluating whether a defendant has received fair notice of the magnitude of the punitive damages award that might be imposed: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the punitive damages award and the actual or potential harm inflicted; and (3) the civil and criminal sanctions provided for comparable misconduct. *Id.* at 574-85, 116 S.Ct. 1589. The Court then analyzed the facts of *Gore* in light of those guideposts and concluded that the punitive damages award in that case

was "grossly excessive," in violation of the Due Process Clause.[9] It then remanded the case to the Alabama Supreme Court. *Id.* at 586, 116 S.Ct. 1589.

In this proceeding, defendant argues that the *Oberg* (state) rational juror standard of post-verdict judicial review "has been effectively overruled" by *Gore* and that the *Gore* guideposts alone should guide post-verdict review of punitive damages awards in Oregon. Defendant contends that, under the *Gore* guideposts, the jury's $1 million punitive damages award and the Court of Appeals' $300,000 punitive damages award both are "grossly excessive" in violation of the Fourteenth Amendment.

In response, plaintiff disputes whether *Gore* superseded *Oberg* (state). According to plaintiff, *Oberg* (state) announced a "state law review process" that the court must apply before applying *Gore*'s substantive due process

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[9] The Court has indicated that the Due Process Clause imposes both procedural and substantive limits on punitive damages awards. Procedural due process requires "adequate guidance from the court" in the form of procedural safeguards to ensure that juries do not impose punitive damages in an arbitrary manner. *See Oberg* (federal), 512 U.S. at 432, 114 S.Ct. 2331 (post-verdict judicial review of punitive damages awards required as procedural safeguard under Due Process Clause); *Haslip,* 499 U.S. at 23, 111 S.Ct. 1032 (endorsing Alabama's procedural protections, including adequate jury instructions and post-trial procedures for scrutinizing punitive damages awards).

Substantive due process, by contrast, requires a jury's punitive damages award to be "reasonable in [its] amount and rational in light of [its] purpose to punish what has occurred and to deter its repetition." *Haslip,* 499 U.S. at 21, 111 S.Ct. 1032; *see also Gore,* 517 U.S. at 562, 116 S.Ct. 1589 (Due Process Clause prohibits imposition of "grossly excessive" punishment on tortfeasors); *TXO,* 509 U.S. at 453-54, 113 S.Ct. 2711 (Due Process Clause "imposes substantive limits beyond which penalties may not go" (internal quotation marks omitted)).

review under the federal constitution. Citing *Oberg* (state), 320 Or. at 549, 888 P.2d 8, plaintiff argues that, by focusing solely on the *Gore* guideposts, defendant has "abandoned its state law prong of its challenge" and conceded that the jury's verdict was rational "in light of the record as a whole," based on "the statutory and common law factors" governing the proceeding. Plaintiff also argues that, under the *Gore* guideposts, the evidence before the jury in this proceeding "fully supports" the reasonableness of the jury's $1 million punitive damages award and, therefore, that award does not violate the Fourteenth Amendment.

Although defendant's challenge to the jury's punitive damages award arises under the federal constitution, we begin by addressing plaintiff's characterization of the *Oberg* (state) rational juror standard as a "state law standard." *See State v. Kennedy,* 295 Or. 260, 262, 666 P.2d 1316 (1983) (court must resolve all questions of state law before reaching federal constitutional arguments). As mentioned above, the court in *Oberg* (state) responded to the Supreme Court's holding that the Due Process Clause of the Fourteenth Amendment requires post-verdict review for excessiveness. There is, however, no "state law excessiveness challenge" under the Oregon Constitution.[10] *See*

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[10] After the *Oberg* (state) decision, the 1995 Oregon Legislature codified the *Oberg* (state) standard of post-verdict review in ORS 18.537. Or. Laws 1995, ch. 688, § 2. That statute provides, in part:

> "(2) If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an

(Continued on following page)

Or Const, Art VII (Amended), § 3 (prohibiting any "fact tried by a jury" from being "re-examined in any court of this state," unless no evidence supports the verdict); [11] *Van Lom v. Schneiderman,* 187 Or. 89, 110-13, 210 P.2d 461 (1949) (assessment of punitive damages is question of fact committed to decision of jury), *overruled in part on other grounds by Oberg* (state), 320 Or. at 549, 888 P.2d 8.

Before the people adopted Article VII (Amended), section 3, in 1910, an Oregon trial court had the power to set aside a jury's verdict when it considered the verdict to be excessive. *See, e.g., Lindsay v. Grande Ronde Lumber Co.,* 48 Or. 430, 438-39, 87 P. 145 (1906) (duty of trial court to set aside excessive jury verdict); *Nelson v. Oregon Railway Etc. Co.,* 13 Or. 141, 142-43, 9 P. 321 (1886) (same). It was well settled at that time that a trial court's refusal to set aside a jury verdict as excessive could not be reviewed on appeal (except when there was "no evidence to support the verdict"), "because [that decision] does not present a question of law, but one of fact[.]" *Lindsay,* 48 Or. at 438, 87 P. 145. Under Article VII (Amended), section 3, however, courts no longer have a common-law power to

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> award of punitive damages for the specific type of claim at issue in the proceeding."

ORS 18.537 became effective after the trial in this proceeding. Or. Laws 1995, ch. 688, § 6.

[11] Article VII (Amended), section 3, of the Oregon Constitution, provides, in part:

> "In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. * * *"

review punitive damages awards for excessiveness. *See Van Lom,* 187 Or. at 94, 210 P.2d 461 (so stating). In *Van Lom,* the court emphasized the importance of a litigant's state constitutional guarantee to a jury trial[12] and concluded that the purpose of Article VII (Amended), section 3, was

> "to eliminate, as an incident of jury trial in this state, the common law power of a trial court to re-examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence."

Id. at 99, 210 P.2d 461. Consequently, the court held that, under the Oregon Constitution, a reviewing court may examine the record only "to determine whether it can affirmatively say there is no evidence to support the verdict." *Id.* at 95, 210 P.2d 461 (internal quotation marks omitted); *see also State v. Brown,* 306 Or. 599, 604, 761 P.2d 1300 (1988) (fact decided by jury may not be reexamined unless reviewing court can say affirmatively that there is no evidence to support jury's decision); ORCP 64 B(5) (trial court may grant new trial if evidence is insufficient to justify verdict or is against the law); *Hill v. Garner,* 277 Or. 641, 643, 561 P.2d 1016 (1977) (court may not grant judgment notwithstanding verdict if there is any evidence to support verdict). As noted by the Supreme Court in *Oberg* (federal), between 1910 and 1995, Oregon was the only state in the Union that did not have some form of post-verdict judicial review of the amount of a

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[12] That right is found in Article I, section 17, of the Oregon Constitution, which provides: "In all civil cases the right of Trial by Jury shall remain inviolate."

punitive damages award. *Oberg* (federal), 512 U.S. at 427-28.

The defendants in *Oberg* (state) challenged the jury's punitive damages award as excessive under the Due Process Clause of the Fourteenth Amendment. 320 Or. at 547, 888 P.2d 8. In response to that challenge, *Oberg* (state) announced the standard that this court determined was required by the *federal constitution* for post-verdict review of punitive damages awards. 320 Or. at 549-51, 888 P.2d 8. Similarly, defendant in this proceeding challenges the jury's $1 million punitive damages award as excessive. As is made clear from the preceding discussion, in Oregon, except for issues arising on review under ORS 18.537, a challenge to a punitive damages award may be made only under the Due Process Clause of the Fourteenth Amendment. By relying on the Fourteenth Amendment as the source for that challenge, defendant has not conceded the reasonableness of the punitive damages award under the rational juror standard articulated in *Oberg* (state).

As noted, defendant questions the validity of the *Oberg* (state) standard following the Supreme Court's decision in *Gore*. We find no suggestion in *Gore* that the Court changed the existing standard – gross excessiveness – or excluded judicial consideration of other factors that might be relevant in assessing whether a punitive damages award is excessive. In *Oberg* (federal), the Court stated:

> "Although courts adopting a more deferential approach use *different verbal formulations,* there may not be much practical difference between review that focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of the standard

> this Court articulated in *Jackson v. Virginia,* [443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)] (whether 'no rational trier of fact could have' reached the same verdict)."

512 U.S. at 432 n. 10, 114 S.Ct. 2331 (emphasis added). That statement was one of two passages from *Oberg* (federal) that led this court to conclude in *Oberg* (state) that the correct standard is whether the award of punitive damages is within the range that a rational juror would be entitled to award in light of the record as a whole. *Oberg* (state), 320 Or. at 550-51, 888 P.2d 8.[13] In other words, the rational juror inquiry merely is one of the "different verbal formulations" of the "grossly excessive" standard previously adopted by the Supreme Court. Subsequently, in *Gore,* the Court adhered to its "gross excessiveness" standard:

> "Only when an award can fairly be categorized as '*grossly excessive*' * * * does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."

517 U.S. at 568, 116 S.Ct. 1589 (emphasis added). We conclude, therefore, that the rational juror standard is compatible with and does not differ practically from *Gore's*

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[13] The second passage from *Oberg* (federal) that this court relied on in *Oberg* (state), 320 Or. at 550, 888 P.2d 8, for guidance stated:

> "What we are concerned with is the possibility that a culpable defendant may be unjustly punished; evidence of culpability warranting some punishment is not a substitute for evidence providing *at least a rational basis* for the particular deprivation of property imposed by the State to deter future wrongdoing."

Oberg (federal), 512 U.S. at 429, 114 S.Ct. 2331 (emphasis added).

gross excessiveness inquiry, and that *Gore* has not "superseded" the rational juror standard that this court articulated in *Oberg* (state).

We find further support for our conclusion in the *Gore* Court's discussion of the "guideposts." To begin with, the *Gore* majority did not reject the standards of review that the Alabama Supreme Court already had applied – standards that the Supreme Court previously had endorsed in *Haslip*. Moreover, on more than one occasion, the Court expressly has stated that the federal excessiveness standard cannot be defined by a formula or a bright line. *See id.* at 582, 116 S.Ct. 1589 (rejecting notion that "the constitutional line is marked by a simple mathematical formula"); *see also TXO,* 509 U.S. at 455-58, 113 S.Ct. 2711 (refusing to formulate "test" for determining whether particular punitive damages award is "grossly excessive"); *Haslip,* 499 U.S. at 18, 111 S.Ct. 1032 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."). Accordingly, we conclude that the guideposts announced in *Gore* are additional factors for the reviewing court in Oregon to consider as part of the *Oberg* (state) rational juror review.

In summary, the rational juror inquiry survives as the standard for post-verdict judicial review of an award of punitive damages in Oregon under the Fourteenth Amendment. A jury's punitive damages award is not "grossly excessive" – and, therefore, will not be disturbed on review – if it is within the range that a rational juror would be entitled to award in light of the record as a whole. Combining the factors announced by the Supreme Court in *Gore* with those announced by this court in *Oberg*

(state), the range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue, *Oberg* (state), 320 Or. at 549, 888 P.2d 8; (2) the state interests that a punitive damages award is designed to serve, *Gore,* 517 U.S. at 568, 116 S.Ct. 1589; (3) the degree of reprehensibility of the defendant's conduct, *id.* at 575, 116 S.Ct. 1589; (4) the disparity between the punitive damages award and the actual or potential harm inflicted, *id.* at 580, 116 S.Ct. 1589; and (5) the civil and criminal sanctions provided for comparable misconduct, *id.* at 583, 116 S.Ct. 1589.

Before we can apply those factors to this proceeding, we must consider two preliminary procedural issues regarding judicial review of a punitive damages award: (1) the factual record to which the court addresses its review; and (2) the remedies available if the reviewing court concludes that an award of punitive damages is grossly excessive. We turn now to the first issue.

In Oregon, calculating punitive damages is the function of the jury. *Van Lom,* 187 Or. at 108, 210 P.2d 461. Since its adoption, Article VII (Amended), section 3, of the Oregon Constitution, has prevented Oregon courts from reviewing punitive damages awards for alleged excessiveness unless there was no evidence to support the jury's verdict. *Id.* at 110-13, 210 P.2d 461. Under *Oberg* (federal), and *Gore,* however, the federal constitution requires the availability of post-verdict judicial review of punitive damages awards. Although application of the gross excessiveness standard is a question of law, we recognize that, as part of that application, the reviewing court must "re-examine" the facts in the record – a requirement that is

contrary to Oregon law. As this court noted in *Oberg* (state):

> "In *Van Lom* * * *, this court held that an assessment of punitive damages is a question of fact committed to the decision of a jury, to which Article VII (Amended), section 3, applies. Therefore, a trial or appellate court is prohibited from reviewing an award of punitive damages if there is evidence in the record to support a jury's finding that punitive damages should be awarded. * * * It is that aspect of the holding in *Van Lom,* construing Article VII (Amended), section 3, that comes into direct conflict with the decision of the Supreme Court of the United States in this case, [*Oberg* (federal)], concerning the requirements of federal due process. Under the Supremacy Clause, we are bound to follow the requirements of federal due process in the face of that conflict."

320 Or. at 548-49, 888 P.2d 8 (footnotes and citations omitted).

Although the federal requirement of judicial review for excessiveness directly conflicts with the re-examination clause of Article VII (Amended), section 3, of the Oregon Constitution, that requirement has not altered the parties' right, under Article I, section 17, of the Oregon Constitution, to a trial by jury regarding a claim for punitive damages. As is true in other contexts, the proper response of an Oregon court to the overlapping and potentially conflicting requirements of federal and state constitutional law is to give effect, to the greatest extent possible, to *all* pertinent constitutional requirements. That principle applies in the context of judicial review of a punitive damages award.

Accordingly, because the amount necessary to punish what has occurred and deter its repetition is a question for the jury, we hold that, when reviewing a punitive damages award for excessiveness, the reviewing court must view the facts in the light most favorable to the jury's verdict if there is evidence in the record to support them. *See generally Gore,* 517 U.S. at 579-80, 116 S.Ct. 1589 (accepting jury's finding that BMW suppressed material fact that it was obligated to communicate to customers under Alabama law, but determining that BMW's omission was not sufficiently reprehensible to justify $2 million punitive damages award); *Haslip,* 499 U.S. at 13, 111 S.Ct. 1032 (no reason to question jury finding when it is supported by record). In other words, the reviewing court must resolve all disputes regarding facts and factual inferences in favor of the jury's verdict and then determine, on the facts as the jury was entitled to find them, whether the award violates the legal standard of gross excessiveness. The reviewing court's examination of the "record as a whole" is limited to the evidence that was before the jury. *Oberg* (state), 320 Or. at 552-56, 888 P.2d 8.

Those same overlapping and potentially conflicting requirements of federal and state constitutional law are relevant to our consideration of the second procedural issue noted *ante,* concerning the remedies available if the reviewing court concludes that an award of punitive damages is excessive. We turn now to that issue.

As noted, the federal requirement of judicial review of a punitive damages award for excessiveness protects a party from entry of a judgment that contains a grossly excessive award of punitive damages. However, that requirement has not altered the parties' right, under Article I, section 17, of the Oregon Constitution, to a trial

by jury regarding a claim for punitive damages, including the determination of the amount of punitive damages. For example, the federal requirement of judicial review does not empower Oregon courts to disturb a jury's award and enter an award of punitive damages that the court regards as not excessive. Accordingly, if a court reviews a punitive damages award and determines, as the trial court did here, that some lesser amount is the highest amount that a jury lawfully could award, then the court must protect the moving party from entry of a judgment for the excessive amount, but at the same time must give effect, to the extent practicable, to the state-protected right to have a jury determine the amount of a punitive damages award. Courts can fulfill both federal and state constitutional obligations, and avoid a potential conflict in those requirements, by proceeding as follows when reviewing a jury's award of punitive damages.

A party may challenge a jury's punitive damages award as excessive under the Fourteenth Amendment by filing a motion for a new trial under ORCP 64(B)5, which provides:

> "A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:
>
> "* * *
>
> "B(5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law."

See also Oberg (state), 320 Or. at 552 n. 9, 888 P.2d 8 (defendants' challenge to punitive damages award on

ground of excessiveness appropriately raised in trial court in motion for new trial).[14]

In response to the motion, the reviewing court must determine whether the jury's award is grossly excessive under the standards discussed in this opinion. If the answer is yes, then the reviewing court, in addition, should determine, by applying the same standards, the upper limit of the range, or the highest lawful amount, of punitive damages that a rational juror could award, consistent with the Due Process Clause, based on the record as a whole. Unless the nonmoving party agrees to entry of an amended judgment for the reduced amount of punitive damages determined by the court, the court must grant a new trial.

The procedure described above is required to protect the nonmoving party's right to a jury trial regarding the issue of punitive damages. [15] That procedure also protects

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[14] In this proceeding, defendant filed motions for directed verdict (ORCP 60) and for JNOV (ORCP 63) on the ground that there was "no evidence to support [plaintiff's] punitive damages claim." *See* ORCP 63 A (condition precedent to motion for JNOV is motion for directed verdict); *Vancil v. Poulson*, 236 Or. 314, 320, 388 P.2d 444 (1964) (grounds asserted in motion for JNOV must have been raised in preceding motion for directed verdict). However, a party cannot challenge a verdict for punitive damages as excessive until *after* the jury renders its verdict. Therefore, that challenge properly is made by a motion for new trial (ORCP 64 B(5)). A motion for new trial on the ground that a jury's punitive damages award is excessive may be joined with a motion for JNOV, or may be made on its own. *See* ORCP 63 C (motion in alternative for new trial may be joined with motion for JNOV).

[15] The United States Supreme Court has reached the same conclusion under the Seventh Amendment to the United States Constitution. *Hetzel v. Prince William County*, 523 U.S. 208, 211, 118

(Continued on following page)

the moving party's right to a jury trial. That is, the jury trial and verdict afford the moving party the right to a jury trial protected by the Oregon Constitution. The moving party's motion for a new trial, on the ground that the jury's verdict is grossly excessive, signifies that party's election for a reexamination by the court of the jury's punitive damages award under the legal standard required by the Due Process Clause. After conducting that reexamination, the court must deny the motion for new trial on that ground if the award meets the required standard. If the award fails that test, however, then the court must grant a new trial unless the nonmoving party agrees to entry of an amended judgment for a reduced amount of punitive damages, as determined by the reviewing court.[16] Each party may seek appellate review of any determination by the court to which it timely objects. In any event, the procedure discussed above affords both the

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S.Ct. 1210, 140 L.Ed.2d 336 (1998) (imposition of reduced punitive damages award without allowing nonmoving party option of new trial "cannot be squared with the Seventh Amendment"). Although the Seventh Amendment does not apply through the Fourteenth Amendment to the states, *Minn. & St. Louis R.R. v. Bombolis,* 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916), with the exception of the final phrase, that amendment almost is identical to Article VII (Amended), section 3, of the Oregon Constitution. The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[16] *See generally Adcock v. Oregon Railroad Co.,* 45 Or. 173, 178-81, 77 P. 78 (1904) (defendant who moves for new trial on ground that punitive damages award is excessive is not deprived of right to jury trial when trial court overrules motion for new trial on condition that plaintiff agree to reduced damages award).

moving party and the nonmoving party with all to which they are entitled under the state and federal constitutions.

We turn to our review of the jury's punitive damages award in this proceeding, beginning with the statutory and common-law factors that allow an award of punitive damages for a UTPA violation in Oregon. *Oberg* (state), 320 Or. at 552-56, 888 P.2d 8.

The substantive criteria to be considered by an Oregon factfinder in deciding whether to make an award of punitive damages in an action for unlawful trade practices are set out in ORS 646.638. That statute provides that punitive damages may be awarded when a person has suffered

> "any ascertainable loss of money or property * * * as a result of willful use or employment by another person of a method, act or practice declared unlawful by ORS 646.608[.]"

In this case, the trial court instructed the jury that it could consider awarding punitive damages if it found that defendant "willfully engaged in * * * unlawful trade practices." The jury so found.

The court also instructed the jury that, to award punitive damages, plaintiff had to prove by clear and convincing evidence that defendant had engaged in conduct "amounting to a particularly aggravated, deliberate disregard of the rights of others." *See former* ORS 41.315 (1993), *repealed by* Or. Laws 1995, ch. 688, § 6 (plaintiff must prove entitlement to punitive damages by clear and convincing evidence); UCJI 75.02 (so defining "wanton" misconduct). Finally, the trial court instructed the jury that, in setting an award for punitive damages, it should consider: (1) the character of defendant's conduct; (2)

defendant's motive; and (3) the "sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future."

We agree with the trial court and the Court of Appeals that the record in this proceeding reveals that defendant committed "an extraordinarily egregious violation" of the UTPA. *Parrott,* 156 Or.App. at 272, 965 P.2d 440. At trial, plaintiff presented evidence that permitted the jury to conclude, by clear and convincing evidence, that defendant acted with a deliberate disregard of the rights of others "of a magnitude evincing a high degree of social irresponsibility." *Schmidt v. Pine Tree Land Dev.,* 291 Or. 462, 466, 631 P.2d 1373 (1981). As noted by the Court of Appeals,

> "[t]here was evidence from which the jury could have found that defendant knew of the extensive defects of the Suburban and of its branded title and odometer discrepancy, and that it concealed those facts from plaintiff. There was evidence from which the jury could have concluded that defendant's treatment of plaintiff was not an isolated incident in that it had established business procedures that it could employ to cover any failure to disclose. There was evidence that defendant also used abusive tactics to cover its deceptions. Furthermore, from the evasive, inconsistent, and implausible explanations given by defendant's representatives as to defendant's business practices, the jury could infer that defendant had no intention of altering its practices in the future."

Parrott, 156 Or.App. at 272-73, 965 P.2d 440.

Next, we identify the state interests that punitive damages are designed to advance in this proceeding. *Gore,*

517 U.S. at 568, 116 S.Ct. 1589. Following the lead of the Supreme Court in *Gore,* we focus our attention on the scope of Oregon's legitimate interests in punishing defendant and deterring it from future misconduct. *Id.* The state interest served by a punitive damages award under the UTPA is protection of the consumer. It is unquestionable that Oregon has a significant interest in protecting its citizens from deceptive trade practices. *See, e.g., id.* ("No one doubts that a State may protect its citizens by prohibiting deceptive trade practices [.]"). It also is clear that Oregon's interests were implicated by defendant's tortious conduct. Plaintiff proved that defendant willfully engaged in deceptive business practices in Oregon. *Cf. id.* at 572-73, 116 S.Ct. 1589 (state "does not have the power * * * to punish [a defendant] for conduct * * * that had no impact on [the state] or its residents").

We consider next the degree of reprehensibility of defendant's conduct. *Id.* at 575, 116 S.Ct. 1589. As stated by the Supreme Court in *Gore,* the degree of reprehensibility of defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award [.]" *Id.* In *Gore,* the Court concluded that the defendant's conduct was not "particularly reprehensible," because the harm was "purely economic" and because there was no evidence that the defendant had "repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful[.]" *Id.* at 576, 116 S.Ct. 1589.

Unlike in *Gore,* the tortious conduct in this proceeding did not involve undisclosed cosmetic damage to a new vehicle. Rather, defendant made material misrepresentations about the Suburban's condition that affected its value. As a result of the Suburban's defects, plaintiff was unable to obtain comprehensive insurance coverage.

Additionally, when the Suburban's then- current registration expired, he would have been unable to drive it within the Portland metropolitan area because it could not have been brought into DEQ compliance. Moreover, defendant's failure to disclose that the Suburban previously had been damaged also implicated its overall safety and evinced an indifference not only to plaintiff's health and safety, but also to the health and safety of the general public that would share the road with a potentially unsafe vehicle.

As stated by the Supreme Court in *Gore,* the "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct * * * can warrant a substantial penalty." *Id.* Plaintiff did suffer economic injury, but defendant inflicted that injury intentionally through affirmative misrepresentation of material facts.

Additionally, plaintiff established that defendant's misconduct was part of defendant's day-to-day business dealings and was not limited to the sale of the Suburban to plaintiff. Defendant acknowledged that it never had completed the DMV forms that would have alerted customers to odometer discrepancies. Defendant failed to train its title clerks to look for odometer discrepancies. Defendant's employees asked customers to sign blank or incomplete forms so that defendant could disclaim awareness of odometer discrepancies. In addition, defendant's representations about its sales forms were inconsistent and misleading.

As the trial court noted, "this jury found that [defendant] intentionally took advantage of [plaintiff] in a very blatant sort of way." We agree. Defendant's business practices were designed to facilitate nondisclosure to customers. Defendant deliberately misrepresented or failed to

disclose to plaintiff material information that implicated the value and safety of the Suburban. Defendant also demonstrated a willful disregard of the legislative protections for Oregon consumers and an unwillingness to modify its practices. Those factors distinguish this case from the injury suffered by the plaintiff in *Gore*. We conclude that defendant's conduct was highly reprehensible.

The third factor that we consider is the disparity between the punitive damages award and the actual or potential harm inflicted on plaintiff. *Id.* at 580, 116 S.Ct. 1589. That inquiry focuses not only on whether there is a reasonable relationship between the punitive damages award and the harm that actually occurred, but also between the punitive damages award and "the harm likely to result[.]" *Id.* at 581, 116 S.Ct. 1589. The Supreme Court expressly has rejected, however, "the notion that the constitutional line is marked by a simple mathematical formula[.]" *Id.* at 582, 116 S.Ct. 1589. The Court also has noted that

> "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if * * * a particularly egregious act has resulted in only a small amount of economic damages[,]"

and that, "[i]n most cases, the ratio will be within a constitutionally acceptable range[.]" *Id.* at 582-83, 116 S.Ct. 1589.

In *Gore,* the Court found that the "breathtaking" 500 to 1 ratio "must surely 'raise a suspicious judicial eyebrow.'" *Id.* at 583, 116 S.Ct. 1589 (*quoting TXO,* 509 U.S. at 481, 113 S.Ct. 2711 (O'Connor, J., dissenting)). Just

three years earlier, however, in *TXO,* the Court had approved a punitive damages award that was 526 times greater than the compensatory damages award. 509 U.S. at 459-62, 113 S.Ct. 2711. And, two years before the *TXO* decision, the Court had referred to the 4 to 1 ratio in *Haslip* as being "close to the line." *Haslip,* 499 U.S. at 23, 111 S.Ct. 1032. The Court's inconsistent treatment of this particular factor demonstrates that no "simple mathematical formula" controls our review of the ratio of punitive damages to actual and potential harm. *Gore,* 517 U.S. at 582, 116 S.Ct. 1589.

In this proceeding, the ratio between punitive and compensatory damages is 87 to 1. Because defendant's tortious conduct was a routine part of its business practice that it was unwilling to change, we also consider the potential injury that its misconduct may have caused to past, present, and future customers. Additionally, although the actual economic harm that plaintiff suffered in this proceeding was relatively small, that harm was the result of defendant's "particularly egregious" acts. *Id.* Taking all those considerations together, the ratio between the punitive damages award and the actual damages award in this proceeding does not "raise [our] suspicious judicial eyebrow." *Id.* at 583, 116 S.Ct. 1589 (internal quotation marks omitted).

Finally, we compare the jury's punitive damages award and "the civil or criminal penalties that could be imposed for comparable misconduct [.]" *Id.* According to *Gore,* penalties for comparable misconduct are relevant to whether defendant was on notice of "the severity of the penalty" that might be imposed. *Id.* at 574, 116 S.Ct. 1589.

The UTPA explicitly authorizes an award of punitive damages in an action for violations of that act. ORS 646.638(1). The UTPA also provides for administrative sanctions ranging from the extraction of an assurance of voluntary compliance, ORS 646.632(2), to injunctive relief, ORS 646.632, and the loss of a business license, ORS 646.646. In addition, the UTPA authorizes the imposition of other civil remedies, including civil penalties of up to $25,000 per violation, ORS 646.642, restitution, ORS 646.636, and attorney fees, ORS 646.632(8). Although the UTPA also authorizes lesser sanctions, we agree with plaintiff that a regulatory scheme of sanctions that includes interruption or closure of business operations provides sufficient notice to a business defendant that its violation of the law could have serious economic consequences.

Defendant argues that, based on reported Oregon judgments in other UTPA proceedings, "Oregon gave [defendant] no notice that it might impose a penalty this severe." Although punitive damages awards previously imposed for UTPA violations in Oregon generally are instructive, we disagree that defendant had "no notice" that a jury might impose a punitive damages award in this range. Before trial, in response to plaintiffs' second amended complaint seeking $1 million in punitive damages on various claims, defendant stipulated that it "would be able to meet *any* punitive damage award."[17] (Emphasis added.) In light of that stipulation, and considering the range of sanctions provided by the UTPA itself, we conclude that

[17] The court did not inform the jury about defendant's stipulation.

defendant was on notice of the magnitude of the sanction that the jury might impose.

In summary, after considering (1) the statutory and common-law factors that allow an award of punitive damages for a UTPA violation; (2) the state's interest in protecting Oregon consumers by punishing violators of the UTPA and deterring them and others from similar misconduct; (3) the reprehensible nature of defendant's conduct; (4) the ratio between punitive damages awarded and the actual and potential harm caused by defendant's tortious conduct; and (5) the range of sanctions provided under the UTPA for comparable misconduct and defendant's stipulation that it could pay "any punitive damages award," we conclude that $1 million is within the range that a rational juror would be entitled to award in light of the record as a whole. The jury's punitive damages award in this case was not grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court with instructions to reinstate the jury's $1 million punitive damages award.

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No. 02-342

IN THE

Supreme Court of the United States

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION, AND SCHERING CORPORATION,

Petitioners,

v.

FREDERICK D. EDWARDS, M.D.,

Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Did Oregon violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by allowing duplicative multi-million dollar punitive damages awards to be imposed on petitioners (a) for the same effects of the same course of conduct and (b) for extraterritorial effects of nationwide conduct?

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BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE [1]

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing more than 100 research-intensive companies

[1] In accordance with Rule 37.2(a) of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent, accompanying this brief, have been filed with the Clerk of the Court.

In accordance with Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

engaged in the discovery and development of prescription pharmaceutical products. PhRMA member companies produce the vast majority of the prescription medicines used in the United States. They annually invest more than $8 billion in research and development. This substantial private research effort is the source of virtually all new drugs marketed in the United States.

The threat and actual awards of disproportionate, excessive, and duplicative punitive damages against pharmaceutical manufacturers are compromising the industry's research efforts and depriving Americans of significant pharmaceutical therapies. In important areas such as childhood vaccines and drugs for pregnant women, liability concerns already have had a demonstrable negative impact both on research and on the continued availability of beneficial products to the people who need them. *See generally* Bruce N. Kuhlik & Richard F. Kingham, *The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability*, 45 Food Drug Cosm. L.J. 693 (1990).

The development and distribution of new drugs have been compromised to an unusual extent by the recent explosion in punitive damages awards. Research and development are expensive, time-consuming tasks. Despite extensive testing and exacting regulation by the federal government, full knowledge of the risks presented by new drugs can never be gained prior to marketing and widespread use. In addition, all drugs are associated with adverse events in some patients. These harms cannot be avoided, regardless of the degree of care exercised by researchers and manufacturers; and, as this case illustrates, they give rise to large punitive damages awards. *See generally* Kuhlik & Kingham, *supra*.

PhRMA hopes that this additional perspective will assist the Court in developing constitutional standards that limit the award of punitive damages.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with an ideal vehicle to correct a pervasive and clearly unconstitutional practice that has become routine in Oregon and numerous other jurisdictions in awarding punitive damages: the imposition of duplicative punitive damages awards against the same defendant for the same effects of the same course of conduct. Although many lower courts have expressed grave reservations about the fairness and constitutionality of the practice, those courts are inherently incapable of fashioning a remedy because no lower court can bind all the other courts that award punitive damages. Only this Court can prevent the recurring constitutional violations.

Courts across the country are imposing repetitive punitive damages awards against the same defendant for the same effects of the same course of conduct, including punitive damages for effects occurring beyond the borders of the States where they are located. Under the current regime, a defendant may be subjected to punitive damages liability for the same effects of the same act or course of conduct multiple times in Oregon courts and again multiple times in courts in other States that permit punitive damages (the overwhelming majority). The record here clearly presents in one case duplicative punitive awards that punished petitioners for the very same effects of a single course of conduct nationwide in scope and effects.

After awarding $35 million in punitive damages to an injured patient, Paul R. Bocci, on the basis of petitioners' national marketing campaign for its theophylline drug, Theo-Dur, the jury awarded to Mr. Bocci's treating physician, Dr. Frederick D. Edwards, $22.5 million in punitive damages based on precisely the same evidence relating to petitioners' national marketing campaign for Theo-Dur. Mr. Bocci and Dr. Edwards had each sought a punitive award of up to $35 million, on the ground that that figure represented the loss

petitioners had sought to avoid by means of their national marketing campaign, *see* Trial Tr. 3885-88; Trial Exs. 66, 70, 28; and the trial court had instructed the jury that it could not award more than $35 million to either claimant on the basis of that evidence. *See* Trial Tr. at 4308. The instructions and verdict forms, however, plainly permitted the jury to award up to $35 million in punitive damages twice. *See* App. 124, 130.

The $22.5 million award against petitioners is precluded by the Due Process Clause of the Fourteenth Amendment to the Constitution on two separate grounds. First, it overlaps, in its entirety, with the $35 million punitive damages award to Mr. Bocci. Second, the $22.5 million punitive award punishes petitioners for effects of their conduct that occurred outside of Oregon.

Punitive damages are a quasi-criminal sanction intended not to compensate plaintiffs but to fulfill the public's interest in retribution and deterrence. As this Court's punitive damages jurisprudence has made clear, punitive damages cannot constitutionally exceed that amount necessary to punish the defendant and to deter future wrongdoing. Excessive and disproportionate punitive awards deny due process. Once a defendant has been fully punished for the effects of a given course of conduct, a second award based on the identical effects of the identical course of conduct necessarily exceeds the amount required to satisfy society's interest in punishment and deterrence. Thus, duplicative awards are inherently excessive and disproportionate.

This Court has cautioned States against punishing defendants on the basis of injuries occurring beyond their borders. The Court also has repeatedly emphasized that, in imposing punitive damages, the primary inquiry should be directed to the defendant's conduct *vis-à-vis the particular plaintiff* before the court. The Due Process Clause should be inter-

preted to prevent the injustice of multiple punitive awards against the same defendant for the same effects of the same course of conduct.

To avoid punishing a defendant repeatedly for the same in-state effects of the defendant's conduct, state courts would have at least two options. A State could vindicate its interest in retribution and deterrence by (1) permitting each plaintiff (or class of plaintiffs) to recover from a particular defendant only for injuries to it (or them) occurring in the State from that defendant's course of conduct, or (2) permitting the first plaintiff receiving a punitive award to recover for all in-state effects of the defendant's course of conduct and barring all subsequent punitive awards based on in-state effects of that conduct.

ARGUMENT

DUPLICATIVE AWARDS OF PUNITIVE DAMAGES FOR IDENTICAL INJURIES OR OTHER EFFECTS RESULTING FROM THE SAME COURSE OF CONDUCT DENY DUE PROCESS OF LAW.

Punitive damages are not imposed to compensate an injured plaintiff, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); and no particular plaintiff has any "right" to a punitive damages award. *See, e.g., Smith v. Wade*, 461 U.S. 30, 52 (1983) (punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct"). Indeed, recognizing that no given plaintiff is entitled to an exemplary award, Oregon requires that sixty percent of a punitive recovery be remitted to the State. *See*

Or. Rev. Stat. § 18.540 (2001); *DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002) (en banc).[2]

Only plaintiffs who presumptively receive full compensation can also receive punitive damages. *See City of Newport*, 453 U.S. at 267 (punitive damages "are assessed over and above the amount necessary to compensate the injured party"); *Smith*, 461 U.S. at 59 (Rehnquist, J. joined by Burger, C.J., and Powell, J., dissenting) ("by hypothesis [plaintiff] is fully compensated"). Thus, a plaintiff who receives a punitive damages award receives a windfall, which is tolerated in order to achieve the societal goals of punitive damages. *See City of Newport*, 453 U.S. at 267.

Punitive damages are a quasi-criminal sanction. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). They are imposed to vindicate the public's interest in "punish[ing] the defendant and . . . deter[ring] future wrongdoing." *Id.* (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). Punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz*, 418 U.S. at 350.

Under Oregon law, as under the common law generally, each award of punitive damages that becomes final presumptively punishes the defendant fully for its wrongful conduct. Juries are not instructed to punish a defendant partially.

For example, Oregon juries are directed to consider "[t]he sum of money that would be required to discourage the defendant and others from engaging in such [wrongful] conduct in the future." Oregon Uniform Civil Jury Instructions 75.02A (2001). In this case, the jury did not receive that

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[2] Other States have enacted similar statutes. *See, e.g.*, 735 Ill. Comp. Stat. 5/2-1207 (2002); Iowa Code § 668A.1(2)(b) (2001); Mo. Rev. Stat. § 537.675(3) (2001); Utah Code Ann. § 78-18-1(3) (2002).

instruction, but the instruction it did receive did not suggest that it should impose anything less than full punishment.

In other jurisdictions, juries are instructed similarly to impose punitive damages "in an amount sufficient to fulfill their purposes [to punish and to deter]," Ninth Circuit Manual of Model Civil Jury Instructions § 7.5 (2001), or an amount that may be "as large as you believe necessary to fulfill the purposes of punitive damages," Fifth Circuit Pattern Jury Instructions: Civil Cases § 15.13 (1999), or "in such amount as in your sound judgment and discretion you find will punish the defendant for what (he, she, it) did and will deter the defendant and other (people, companies)." New York Pattern Jury Instructions—Civil 2:278 (2002).

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), where the Court upheld a punitive damages award against a due process challenge, the Alabama jury was instructed that it should award punitive damages, if at all, "'to punish the defendant,'" and that "'in fixing the amount [of the punitive award], you must take into consideration the . . . necessity of preventing similar wrong.'" 499 U.S. at 6 n.1 (quoting instructions). An amount less than the sum necessary fully to punish the defendant and to deter the defendant and others would not satisfy such instructions.

A jury following such instructions—and juries are presumed to follow the instructions given them, *see Penry v. Johnson*, 532 U.S. 782, 799 (2001)—will award an amount it determines will fully effectuate the goals of punishment and deterrence. Moreover, the instructions are likely to be reinforced by counsel's argument, as they were in this case. *See* p. 19, *infra*. Plaintiffs certainly have no incentive to argue that the jury should impose anything other than full punishment. Although defendants can be expected to argue that no punitive damages are warranted and that a relatively small award would suffice to satisfy the goals of punishment

and deterrence, defendants would not urge jurors to punish them by an amount that would not suffice.

Some courts have suggested that defendants can reduce the harm from duplicative punitive damages awards by introducing evidence of prior such awards against them and arguing that they should mitigate any need for, or reduce the amount of, any additional award. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1273-74 (Or. 1980). This remedy fails to remove the constitutional flaw and is also impracticable. Even if the jury reduces the amount of the punitive damages award in light of prior awards based on the same effects of the same conduct, whatever amount the jury does award is still duplicative. Moreover, defendants commonly decline to introduce such evidence (which plaintiffs' lawyers could exploit). *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1384 (3d Cir. 1993) (en banc); *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994); *Unified Sch. Dist. No. 490 v. Celotex Corp.*, 629 P.2d 196, 206 (Kan. 1981).

Under the Due Process Clause of the Fourteenth Amendment, once a State has levied a punitive award against a defendant for a given set of injuries and other effects (actual and/or potential) of an act or course of conduct, it should not be permitted to make a second punitive award for that same set of effects of that act or conduct. Due process demands of all judicial proceedings fundamental fairness. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981). Fundamental fairness forbids repeated litigation between the same parties in regard to the same subject of controversy. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (owner of property that could be escheated by two States "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment").

It is beyond debate that a civil plaintiff could not recover twice from the same defendant compensation for the same injury caused by the same act or course of conduct. *See, e.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873) ("In civil cases[,] . . . no man shall be twice vexed for one and the same cause."). It also is clear that the same plaintiff could not recover from the same defendant duplicative punitive awards for the same effects of the same conduct. *See, e.g.*, *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 218-19 (3d Cir. 1992) (same principle that bars duplicative compensatory recovery bars duplicative punitive award); *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1284 (8th Cir. 1981) (award of statutory treble damages and punitive damages barred because duplicative); *Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819, 822 (Colo. 1992) (en banc) (same); *Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361, 367 (Tex. 1988) (same); *Stoner v. Houston*, 582 S.W.2d 28, 31 (Ark. 1979) ("double punitive recover for the same illegal act . . . is prohibited"); *John Mohr & Sons, Inc. v. Jahnke*, 198 N.W.2d 363, 368 (Wis. 1972) ("Two penalties on the same or different theories for the same act violates basic fairness and thus due process of law.").

For precisely the same reasons, two different plaintiffs should not be permitted to recover from one defendant duplicative punitive awards for the same injuries or other effects resulting from the same conduct.[3] The identity of the party obtaining the second punitive award is immaterial. Unlike a plaintiff seeking compensatory relief, a plaintiff seeking a punitive award has no entitlement to the award beyond that necessary to vindicate the *public* interests in punishment and deterrence. *See* pp. 5-6, *supra*. Once the first plaintiff has won from the defendant a punitive award that,

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[3] In Oregon and in States with similar statutes allocating a portion of punitive damages to the State, the State may recover from one defendant duplicative awards based on the same effects of the same conduct.

under the evidence and instructions that led to it, is, with respect to the effects of the defendant's conduct, deemed sufficient to punish the defendant and deter future wrongdoers, no legitimate public purpose is served by permitting a second or subsequent plaintiff to win a further punitive award from the same defendant for the same effects of the same conduct.

No principled basis exists for exempting duplicative awards of punitive damages from the long-standing prohibition against imposing duplicative judgments on the same party for the same claim. To the contrary, the logical conclusion of this Court's due process jurisprudence is that imposing on a defendant repetitive punitive awards for the same effects of a single act or course of conduct denies due process.

This Court has held that, to satisfy the Due Process Clause, punitive damages must be no "greater than reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22. Excessive and disproportionate punitive awards—awards that go beyond the level necessary to punish and deter—violate the Due Process Clause. *See Gore*, 517 U.S. at 568; *cf. id.* at 576 n.24 ("The principle that punishment should fit the crime is 'deeply rooted and frequently repeated in common-law jurisprudence.'") (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983)). States "have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz*, 418 U.S. at 349.

When one punitive damages award presumptively imposes full punishment on the defendant for certain effects of certain conduct, another award, for the same effects of the same conduct, is necessarily "greater than reasonably necessary to punish and deter" the defendant. *Haslip*, 499 U.S. at 22. A duplicative award is inherently excessive and disproportionate and serves no legitimate governmental interest. *See Gertz*, 418 U.S. at 349. The Due Process Clause protects

against "sanctions which are downright irrational." *Hudson v. United States*, 522 U.S. 93, 103 (1997). Duplicative punitive damages awards are "downright irrational." *Id.*

Numerous lower courts have questioned the constitutionality of duplicative punitive awards. *See, e.g.*, *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990) (expressing "misgivings" that binding precedent required the court to reject defendant's argument that imposition of multiple punitive awards denies due process); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir. 1986) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) ("The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234 (D.N.J. 1989) ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 728 ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act. . . . Certainly the principle of res judicata, the notion that

litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is a part of the process that is due under our constitutional system."), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *see also In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims[] would violate the sense of 'fundamental fairness' that is essential to constitutional due process.").

Judge Higginbotham summed up the constitutional conundrum facing lower courts:

> Each jury has before it only one case—it is the aggregate effect of several juries' faithful adherence to the law that poses risk of ultimate destruction. . . . And the premise . . . is that [the] private interests of a plaintiff and the public are parallel. The rub, however, is that after the first award of exemplary damages, that parallelism is lost.

Maxey v. Freightliner Corp., 450 F. Supp. 955, 962 (N.D. Tex. 1978), *aff'd*, 623 F.2d 1367 (5th Cir. 1980), *aff'd in part & vacated & remanded in part on other grounds*, 665 F.2d 1367 (5th Cir. 1982) (en banc).

The lower courts (including federal courts exercising diversity jurisdiction), however, have been powerless to craft a workable solution because they cannot impose one nationally.

> "[S]ingle-state action . . . is an ineffectual response to the problem, because one state cannot control what happens in other jurisdictions. In fact, the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims,

> a situation that hardly provides much law reform incentive for state legislators."

Dunn, 1 F.3d at 1386 (emphasis omitted) (quoting 2 American Law Institute, *Enterprise Responsibility for Personal Injury* 261 (1991)); *see W.R. Grace & Co.—Conn.*, 638 So.2d at 505 ("We acknowledge the potential for abuse when a defendant may be subjected to repeated punitive damage awards arising out of the same conduct. Yet, like the many other courts which have addressed the problem, we are unable to devise a fair and effective solution. Were we to adopt the position advocated by [the defendant], our holding would not be binding on other state courts or federal courts.");[4] *cf. McDermott v. Kan. Pub. Serv. Co.*, 712 P.2d 1199, 1203 (Kan. 1986) ("whether punitive damages may be recovered in a second action between different plaintiffs and the same defendants must be determined on a case-by-case basis").[5]

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[4] *W.R. Grace & Co.—Conn.* pre-dates a Florida statutory provision that (unsuccessfully) attempts to resolve the problem of multiple punitive awards. *See* n.5, *infra*.

[5] Several States have enacted statutes to reduce the incidence of multiple awards of punitive damages for the same effects of the same conduct by the same defendant. *See, e.g.*, Fla. Stat. Ann. § 768.73(2)(a) (West 2002); Mo. Rev. Stat. § 510.263(4) (2001); Act of June 5, 2002, ch. 462, sec. 1, 2002 Okla. Sess. Law Serv. 462 (West) (to be codified at Okla. Stat. tit. 23 § 9.1(C)). Such statutes cannot resolve the constitutional problem of duplicative awards unless all fifty States—not just a handful—enact them. Moreover, the existing statutes do not remedy the constitutional defects of duplicative awards insofar as they do not prohibit all duplicative awards for the same effects of the same conduct. *See, e.g.*, Fla. Stat. Ann. § 768.73(2)(a) (allowing duplicative punitive award in subsequent action upon court finding that a punitive award imposed in prior action was insufficient); Mo. Rev. Stat. § 510.263(4) (granting court discretion to give defendant credit for prior punitive awards for the same conduct, but allowing court to deny credit based, *inter alia*, on whether the defendant "unreasonably continued the [wrongful] conduct after acquiring actual knowledge of the dangerous nature of such conduct"); § 1, 2002 Okla. Sess. Law Serv. 462 (providing for reduction—but not

Indeed, this kind of permissive system reigns in Oregon, whose highest court answered in the negative the question "whether, after punitive damages have been awarded in one case, a judge may remove punitive damages from the jury's consideration in all subsequent cases involving the same set of defendants and arising from the same continuing wrongful act." *Crookham*, 618 P.2d at 1270. Subsequent Oregon juries may consider prior awards, but are not barred from imposing additional awards on a defendant that has already been fully punished by a punitive award for the totality of the effects of its conduct. *See id.* at 1273. This aspect of Oregon's punitive damages jurisprudence cannot be squared with the Due Process Clause.

Surely, there must be some means to prevent duplicative punitive damages awards in violation of the Due Process Clause. The current absence of such a means reflects the inability in our federal system of individual States and lower federal courts to bring about a fair and uniform national system. Intervention by this Court under the Due Process Clause is necessary for that. Two bedrock principles readily discernable in the Court's constitutional jurisprudence, if faithfully applied by state and lower federal courts, would greatly reduce the risk of future due process violations resulting from duplicative punitive awards.

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elimination—of subsequent awards based on the same conduct punished by prior awards by Oklahoma—but not other State—courts); *see also* n.6, *infra*. Finally, several such statutes have been repealed or held unconstitutional. *See, e.g.*, *McBride v. GMC*, 737 F. Supp. 1563, 1579 (M.D. Ga. 1990) (holding unconstitutional on federal and state equal protection and due process grounds section 51-12-5.1(e)(1) of the Georgia Code, which prohibited duplicative awards, but only in product liability cases); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (Ohio 1999) (holding that provision requiring reduction of punitive damages based on prior punitive verdicts violated the State constitutional right to jury trial).

First, one State lacks the power to "enact . . . a policy for the entire Nation," or to "impose its own policy choice on neighboring States." *Gore*, 517 U.S. at 571. "[T]he Constitution has a 'special concern . . . with the autonomy of the individual States within their respective spheres.'" *Id.* at 571-72 (quoting *Healy v. Beer Inst.*, 491 U.S 324, 335-36 (1989)).

This long-standing constitutional safeguard of State sovereignty precludes a State from imposing policies to punish or to deter on the basis of injuries or other effects occurring in other jurisdictions, regardless of whether the underlying conduct is lawful or unlawful in those jurisdictions. *Cf. id.* at 572-73. A State that reaches out to punish for extraterritorial effects of conduct effectively precludes other jurisdictions from deciding whether any punitive damages for such conduct are warranted and, if so, the appropriate amount for injuries and other effects within their borders. Moreover, the overreaching State virtually ensures that, should other States choose to award punitive damages for that same conduct based on effects within their borders, they will be imposing a duplicative award on the defendant. Thus, in awarding punitive damages, States should constitutionally be limited to punishing and deterring for injuries or other effects that occur within their own borders. By requiring all States to confine their punitive sanctions to effects within their borders, this Court would eliminate the multiple overlapping punitive awards that plague our system across state boundaries.

Second, within its own borders, each State should be precluded from imposing on a defendant duplicative punitive awards for the same effects of the same conduct. Under the approach suggested here, a State, acting through its legislature or courts, would have at least two options for preventing unconstitutional duplicative awards.

A State could limit each punitive damages award against a particular defendant for a particular act or course of conduct

to the effects of that act or conduct on the particular plaintiff(s) before the court. This option would permit multiple punitive damages awards for the same general course of conduct, but not for the same effects of that conduct: each plaintiff who meets the requirements for punitive damages could receive punitive damages, but only for that plaintiff's own injury. That limitation would restrict the plaintiff's evidence and argument, and would be reflected in the jury instructions.

The roots of this option lie in this Court's punitive damages jurisprudence. In prior punitive damages cases, even while considering conduct toward others as a possible aggravating factor, this Court has been careful to focus on the defendant's conduct with respect to the specific *plaintiff(s)*. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the Court emphasized the "potential loss to respondents" resulting from the petitioners' misconduct toward them. *Id.* at 462. Similarly, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court emphasized the absence of "aggravating factors associated with particularly reprehensible conduct" with respect to the "purely economic" "harm BWM inflicted on Dr. Gore." *Id.* at 575-76. Again, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court focused on the potential harm to *the plaintiff* from the defendant's misuse of a photograph of the tool the plaintiff had invented. *Id.* at 442-43. Moreover, each time the Court assesses the ratio between a compensatory award and a punitive award as an indicium of excessiveness, the Court necessarily focuses on the harm suffered by the specific plaintiff. *See, e.g., Gore*, 517 U.S. at 575 (inquiring into "the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award").

The Court's focus on the specific plaintiff before it is not merely longstanding judicial practice and sound judicial

policy. Limiting the basis for the defendant's punishment to effects on the specific plaintiff(s) serves to limit the basis of the award to effects within the State as to which the defendant has not otherwise been ordered to pay punitive damages. The specific focus thereby protects the defendant from duplicative awards potentially far in excess of what is necessary to punish and deter.

Alternatively, a State could allow the first punitive damages award to cover all effects the defendant's act or course of conduct caused in the State, but would have to bar any further award to any other plaintiff based on any such effects. A State might conclude that the disadvantages of a race to judgment might be sufficiently reduced by joinder or class actions, and would be outweighed by the opportunity for an award of full state-wide punitive damages in a single proceeding. In appropriate circumstances, of course, punitive damages may be supplemented by criminal prosecution.

The prohibition of duplicative punitive awards against the same defendant for the same effects of the same conduct would apply without regard to the specific amount of any particular award. As a matter of law, the first award for a particular set of effects that becomes final fully vindicates the State's interest in punishment and deterrence with respect to those effects, and any further such award with respect to those effects is constitutionally excessive, no matter the amount of the final award or the potential amount of any prospective further award. The finality of the first award warrants the presumption that it was based on a fair trial of an actual controversy, in which, *inter alia*, the evidence was adequate and the jury instructions were correct. A subsequent award premised on a finding that an earlier award for the same effects was insufficient would deny due process.

This prohibition of duplicative awards would supplement, not supplant, the type of review for excessiveness adopted by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S.

559 (1996). That type of review would continue to apply to initial awards of punitive damages for specified effects. The prohibition would apply only to duplicative awards for the same effects.

The Oregon courts in this case adopted no such limiting principle. The jury here awarded Mr. Bocci $35 million in punitive damages from petitioners based on the nationwide effects of petitioners' nationwide marketing campaign, and then awarded Dr. Edwards $22.5 million in punitive damages for precisely the same effects of the same conduct. The trial court acknowledged that Dr. Edwards's claims against petitioners were largely identical to Mr. Bocci's. *See, e.g.*, Trial Tr. 4272, 4279. Yet in the jury instructions and, even more plainly, in the verdict forms given to the jury—which permitted the jury to make awards of up to $35 million in punitive damages to Mr. Bocci *and separately* to Dr. Edwards, *see* App. 124, 130—the trial court permitted the jury to impose duplicative awards.

The $22.5 million award would have been duplicative even if it and the $35 million award had been based solely on effects occurring in Oregon. Indeed, under Oregon law, there is nothing to stop a future Oregon plaintiff from seeking yet another punitive damages award for the very same effects of petitioners' conduct.[6]

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[6] Under Oregon law, in a product liability case, one of the criteria on which punitive damages, if any, shall be awarded is

> [t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

Or. Rev. Stat. § 30.925(2)(g) (2001). Both section 30.925(2)(g) and, in limited circumstances, section 18.537 give discretion to avoid duplicate awards, but neither statute precludes such awards. Neither prevents a later jury or court from finding inadequate a punitive award that an earlier jury

In this case, the punitive damages are even more offensive to due process because they are based on nationwide effects of nationwide conduct. Dr. Edwards' counsel invited the jury to punish and to deter petitioners for the nationwide effects of petitioners' conduct. Counsel discussed the effects of petitioners' nationwide marketing campaign on "doctors in this country" and "American doctors," Trial Tr. 4070, 4099, and asked the jury to "put a stop to a number of these tragedies in this country." *Id.* at 4266. In view of the bases for the two punitive awards in this case, insofar as any other State permits a punitive award for effects of the same conduct, petitioners would be subjected to even further duplicative awards of punitive damages.

In sum, this case presents the opportunity for the Court to address two issues—whether the Due Process Clause permits a single State to impose duplicative punitive damages awards for the same effects of a single course of conduct, and whether the Due Process Clause permits States to award punitive damages for the extraterritorial effects of conduct.

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and court found adequate, and neither gives "credit" for prior exoneration with respect to punitive damages liability. *See id.* § 30.925(2)(g); Or. Rev. Stat. § 18.537(3) (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION,

Petitioners,

v.

FREDERICK D. EDWARDS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The Oregon Court Of Appeals

BRIEF FOR ASSOCIATED OREGON INDUSTRIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Associated Oregon Industries ("AOI") was established in 1895 as an organization to promote Oregon products. Today, AOI is a nonprofit statewide business and lobbying organization representing over 2,400 principal members and 16,000 associate businesses. Its member businesses employ approximately 30 percent of Oregon's entire private workforce.

AOI members are companies and individuals interested in Oregon business issues. AOI membership reflects the diversity of Oregon business, from small start-up companies to some of the state's largest employers, spanning every county in the state. AOI represents its members before the Oregon Legislature, in courts of law, and before state rule-making agencies in areas such as education, employment, energy deregulation, environment, health care, natural resources, retail, taxation, transportation, workplace safety and workers' compensation. Because AOI addresses broad-based business issues, it does not generally become involved in issues affecting only a specific aspect of an industry.

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[1] In accordance with Rule 37.2(a) of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent, accompanying this brief, have been filed with the Clerk of the Court. In accordance with Rule 37.6 of the Rules of this Court, *amicus* states that counsel for the petitioners participated in the authorship of this brief. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of the brief. Petitioner is an associate member of Associated Oregon Industries.

The members of AOI have no single viewpoint regarding the regulation of the pharmaceutical industry, and AOI takes no position as to the propriety or legality of the petitioners' conduct. However, AOI and its members are profoundly concerned about the refusal of Oregon courts to provide meaningful review of punitive damages awarded by juries. AOI believes that the rational juror standard for review of punitive damages adopted by the Oregon Supreme Court is directly inconsistent with the constitutional standards announced by this Court. The application of that standard by state courts in Oregon deprives litigants of meaningful judicial review of punitive damages awards. As a result, litigants in Oregon state courts receive less constitutional protection than they currently receive in federal court or in the courts of other states. Unless reined in by this Court, Oregon's continued pattern of affirming every jury's award of punitive damages – no matter how large or disproportionate to the harm caused – will gravely affect virtually every business in Oregon, dampen an already-struggling economy and discourage new business development in our state.

ARGUMENT

I. DESPITE THIS COURT'S DIRECTION IN *OBERG*, OREGON COURTS HAVE FAILED TO PROVIDE ADEQUATE REVIEW OF PUNITIVE DAMAGES AWARDS

Eight years after this Court's decision in *Honda Motor Co., Ltd. v. Oberg*, Oregon remains alone in the nation in its excessive deference to the jury when conducting appellate review of punitive damages awards. As this Court aptly noted in *Oberg*, "[t]here is a dramatic difference

between the judicial review of punitive damages awards under the common law and the scope of review available in Oregon." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 426 (1994) (*Oberg* (federal)). That observation still holds true, despite the guidance provided by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) on the scope and nature of appellate review of punitive damages required by the federal Constitution. Rather than provide constitutionally adequate review of punitive damages awarded by Oregon juries, Oregon exhibits stubborn allegiance to a "rational juror" standard of review – a sufficiency of the evidence standard that appropriately has been rejected by this Court as inadequate under the principles of due process of law. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456 (1993) (rational basis review of punitive damages awards insufficient).

In *TXO*, this Court explained why a rational basis standard for review of punitive damages awards is constitutionally insufficient: "Under respondents' rational basis standard, apparently *any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." *TXO*, 509 U.S. at 456 (emphasis in original). The Court's hypothetical concern has become a reality in Oregon. Since this Court held that the United States Constitution compelled Oregon to provide judicial review of punitive damages awards, Oregon's appellate courts have considered fourteen cases presenting the issue for decision. As the chart attached to the Petition for Writ of Certiorari demonstrates, 118-a, Oregon appellate courts have affirmed the jury's punitive damages award in thirteen of

those cases. In the fourteenth case, the Court of Appeals significantly remitted the punitive damages, but the Oregon Supreme Court has granted discretionary review to consider, in part, whether the Court of Appeals erred in reducing the jury's punitive damages award. *Jensen v. Medley*, 11 P.3d 678 (Or. Ct. App. 2000), *review allowed*, 52 P.3d 436 (Or. 2002). In four of the cases, the appellate courts reinstated jury verdicts that had been reduced by the trial court. Apart from *Jensen*, *no jury verdict awarding punitive damages has ultimately been reduced by Oregon's appellate courts*. And, given the Oregon Supreme Court's history of affirming a jury's punitive damages award no matter the size, the ultimate result in *Jensen* may well be consistent with this pattern.

Neither the size of the jury's punitive damages verdict nor the extent of its disproportion to actual harm deters Oregon appellate courts from sanctioning the jury's award. In *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001), the Oregon Supreme Court reinstated the jury's punitive damages award, which had been remitted by the Court of Appeals. The Supreme Court concluded that an 87:1 ratio between punitive and compensatory damages awarded solely for economic injury was "within the range that a rational juror would be entitled to award. . . . " 17 P.3d at 490. Shortly thereafter, the Court of Appeals followed the Supreme Court's lead when, in a wrongful death action, it reinstated a jury's punitive damages award that is 97 times the size of the compensatory damages awarded. The Court of Appeals concluded that: "In light of the 87 to 1 ratio in *Parrott*, we see nothing in a ratio of 97 to 1 that raises our judicial eyebrows, given the egregious nature of defendant's conduct as implicitly determined by the jury."

Williams v. Philip Morris Incorporated, 48 P.3d 824, 841 (Or. Ct. App. 2002).

Even the most casual review of the decisions handed down by Oregon appellate courts after *Oberg* should raise this Court's "judicial eyebrows" out of concern over whether litigants in Oregon are receiving the scope and level of review of punitive damages awards mandated by the federal Constitution. A look at the history of punitive damages review in Oregon sheds light on why the Oregon courts have resisted their constitutionally-mandated role to ensure that punitive damages awards comport with federal due process and why the standard of review currently applied by Oregon appellate courts is constitutionally inadequate. The Court should grant the writ of certiorari in this case to ensure that litigants in Oregon courts receive the same due process protection against excessive punitive damages that is provided in federal court and in the courts of other states.

II. OREGON'S "RATIONAL JUROR" STANDARD FOR PUNITIVE DAMAGES REVIEW IS CONSTITUTIONALLY INADEQUATE

A. Prior to *Oberg*, Oregon Courts Held Consistently That the Oregon Constitution Precluded Judicial Review or Modification of the Amount of Punitive Damages Awarded by a Jury.

Oregon's unquestioning loyalty to jury awards of punitive damages has a long history. Since at least 1949, Oregon courts have considered it a violation of the Oregon Constitution for a court to review a jury's determination of the amount of punitive damages. Under the Oregon

Constitution, an Oregon court may not reduce a punitive damages award; it can only overturn the award in its entirety. And the court can set aside an award of punitive damages only if there is no evidence from which a rational jury could conclude that *any* award of punitive damages is warranted. Thus, as a matter of Oregon constitutional law, once it is determined that there is an evidentiary basis for a jury's decision to impose punishment, the jury can award any amount of punitive damages. As a matter of Oregon law, Oregon courts are constitutionally prohibited from considering the rationality or proportionality of a jury's punitive damages award. Whether the jury chooses to award one dollar, or a billion, its decision is untouchable.

This Court's decision in *Oberg* informed the Oregon courts that, regardless of the import of the Oregon Constitution, federal due process requires that Oregon provide "meaningful and adequate review by the trial court and subsequent appellate review" of the amount of a jury's award of punitive damages. *Oberg* (federal), 512 U.S. at 420, 435. But Oregon's complete deference to jury decision making was well entrenched. In the eight years since *Oberg*, Oregon's appellate courts have ensured that, as a practical matter, jury awards of punitive damages remain inviolate.

On remand in *Oberg*, the Oregon Supreme Court fashioned the "rational juror" standard for meeting its federally-mandated responsibility to review punitive damages awards for excessiveness:

> A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a

> rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.

Oberg v. Honda Motor Co., Ltd., 888 P.2d 8, 10 (Or. 1995) (*Oberg* (state)). In effect, Oregon substituted one sufficiency of the evidence test for another. As is evidenced below, the "rational juror" standard fails to comport with this Court's elucidation of due process requirements for review of jury awards of punitive damages.

B. Appellate Review of Punitive Damages Awards in Oregon After *BMW*.

One year after the Oregon Supreme Court decided *Oberg* on remand, this Court decided *BMW of North America v. Gore*, to "help illuminate the 'character of the standard that will identify unconstitutionally excessive awards' of punitive damages. . . . " *BMW*, 517 U.S. at 568, quoting *Oberg* (federal), 512 U.S. at 420. The Oregon Court of Appeals, at least, seemed to be listening. In 1998, in *Blume v. Fred Meyer*, the Court of Appeals acknowledged that the "rational juror" standard was inherently inconsistent with the standard established in *BMW*:

> Although jury instructions and considerations may, in fact, properly constrain a jury's consideration of punitive damages, we agree with defendant that a reviewing court's determination of whether the punitive damage award is unconstitutionally excessive is not dependent on instructions to the jury or on the jury's consideration. Under *BMW*, although the reviewing court accepts the facts and inferences as the jury found them, evaluating whether a punitive damage

> award is excessive requires examination of, but not deference to, the jury's award.

Blume v. Fred Meyer, Inc., 963 P.2d 700, 706 (Or. Ct. App. 1998).

Over the next three years, the Court of Appeals consistently applied the *BMW* analysis and guideposts, and, in 1999, the appeals court approved the first remittitur of a jury verdict in Oregon history. In *Parrott v. Carr Chevrolet, Inc.*, 965 P.2d 440 (Or. Ct. App. 1998), the defendant was found liable for violating Oregon's Unfair Trade Practices Act by failing to disclose defects in a vehicle and its title and discrepancies in the odometer reading. The jury awarded compensatory damages of $11,496 and punitive damages of $1 million. The trial court remitted the punitive damages award to $50,000, and the Court of Appeals increased the remitted award to $300,000, still 26 times the compensatory damages awarded. The next year, in *Jensen v. Medley*, the Court of Appeals found the jury's $1 million award of punitive damages was unconstitutionally excessive and remitted it to $175,000 – five times the compensatory damages award. *Jensen*, 11 P.3d at 689. It appeared that Oregon courts finally were conducting the sort of meaningful review of punitive damages awards that due process requires. However, the Oregon Supreme Court again intervened to restore the primacy of the jury in deciding the amount of punitive damages.

C. *Parrott* and Its Progeny: The Oregon Supreme Court Resurrects the "Rational Juror" Standard.

In *Parrott v. Carr Chevrolet, Inc.*, the Oregon Supreme Court reaffirmed its stubborn adherence to the "rational

juror" standard. The court held that the "rational juror" standard was "compatible with and does not differ practically from *Gore's* gross excessiveness inquiry, and that *Gore* has not 'superseded' the rational juror standard that this court articulated in *Oberg* (state)." *Parrott*, 17 P.3d at 484. The court concluded that the *BMW* standards announced by this Court were merely "additional factors for the reviewing court in Oregon to consider as part of the *Oberg* (state) rational juror review." *Id.* at 484.

Relying on a provision of the Oregon Constitution different from the one at issue in *Oberg*, the court reiterated that "[i]n Oregon, calculating punitive damages is the function of the jury," *id.*:

> Although the federal requirement of judicial review for excessiveness directly conflicts with the re-examination clause of Article VII (Amended), section 3, of the Oregon Constitution, that requirement has not altered the parties' right, under Article I, section 17, of the Oregon Constitution to a trial by jury regarding a claim for punitive damages. As is true in other contexts, the proper response of an Oregon court to the overlapping and potentially conflicting requirements of federal and state constitutional law is to give effect, to the greatest extent possible, to *all* pertinent constitutional requirements. . . .
>
> Accordingly, because the amount necessary to punish what has occurred and deter its repetition is a question for the jury, we hold that, when reviewing a punitive damages award for excessiveness, the reviewing court must view the facts in the light most favorable to the jury's verdict if there is evidence in the record to support them.

Id. at 485 (emphasis in original). As a result, the Oregon court reiterated that punitive damages review in Oregon required nearly unquestioning deference to the jury, and returned to its earlier pattern of affirming a jury's punitive damages award if "a jury could have found" that the punitive damages award was warranted.

D. The "Rational Juror" Standard Conflicts With *BMW* and *Cooper Industries*.

Today, as 50 years ago, the Oregon Supreme Court's approach to excessiveness review is driven by its conclusion that an award of punitive damages is a fact tried by a jury. *Parrott*, 17 P.3d at 482, *citing Van Lom v. Schneiderman*, 210 P.2d 461, 470-71 (1949); *see Oberg* (federal), 512 U.S. at 427; *Cooper Industries*, 532 U.S. at 437 n.10. It is that conclusion that led the court to reject excessiveness review as a matter of state constitutional law, *id.*; *see* Or. Const., art. VII (amended), § 3 (prohibiting judicial reexamination of any "fact tried by a jury"), and it is that conclusion that shapes the "rational juror" review it grudgingly applies to federal due process challenges today. *Parrott*, 17 P.3d at 485.

But the conclusion is flatly at odds with this Court's own conclusion that a jury's determination of the appropriate amount of punitive damages to award, if any, is not a finding of fact. *Cooper Industries*, 532 U.S. at 437. Instead, it is an exercise of judgment and discretion about degrees of culpability, appropriate levels of punishment, and impacts on future conduct. There are no "facts" in the record that constrain this exercise of judgment and discretion. A court typically cannot determine what facts the jury found in setting a punitive damages amount, or how

particular facts weighed in the jury's deliberation. A jury's decision about punitive damages derives instead from the conclusions the jury draws about the egregiousness of the defendant's conduct and the level of punishment that it warrants. The Oregon Supreme Court has decreed that the jury's conclusions about these issues and the resulting punitive damages award must be permitted to stand as long as the evidence, viewed in the light most favorable to the verdict, would allow the jury to draw those conclusions.

This Court's decisions in *BMW* and *Cooper Industries* make clear that there is a constitutional limit on the size of punitive damages awards, and they set forth the standards for reviewing courts to apply in determining those limits. The "guideposts" established in *BMW* were intended to address the question left open in *Oberg*: "'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages." *BMW*, 517 U.S. at 568, quoting *Oberg* (federal), 512 U.S. at 420. These guideposts – the reprehensibility of the defendant's conduct, the reasonableness of the relationship of the punitive damages to the harm suffered by the plaintiff, and comparable civil sanctions – require more than a review of the record in search of evidence to support the jury's punitive damages award. These guideposts require the court to exercise judgment about the reasonableness of punishment and the fairness of notice. They also require the court to consider some factors beyond the evidentiary record and other factors, such as the comparability of other sanctions, that the jury never considers. And the court must engage in this examination independently, without deference to a fictional rational juror, to "make[] certain that the punitive damages are reasonable in their

amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991).

Oregon courts do not provide the kind of independent and searching review of punitive damages awards that federal due process requires. By deferring to what a jury "could have found" about culpability and appropriate punishment, the Oregon court has sanctioned nothing less than a return to the pre-*Oberg* era when a jury verdict in Oregon was inviolate if the record contained any evidence whatsoever to support it. This deferential standard of review does not pass constitutional muster.

III. OREGON'S "RATIONAL JUROR" STANDARD CONFLICTS WITH THE STANDARD FOR PUNITIVE DAMAGES REVIEW APPLIED IN THE NINTH CIRCUIT

Oregon's "rational juror" standard of review conflicts with the standard for punitive damages review applied by the federal circuit in which Oregon lies. The Ninth Circuit accepts the binding precedent established by decisions of this Court and recognizes that federal due process requires plenary, independent and searching review of punitive damages awards applying the *BMW* standards and guideposts as a matter of law. *See, e.g., Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1148 (9th Cir. 2002) (applying "independent review" of punitive damages in Oregon case); *In re the Exxon Valdez*, 270 F.3d 1215, 1240 (9th Cir. 2001) (applying "independent review" standard). Thus, defendants in Oregon are subject to two very different standards of punitive damages review depending on whether the punitive damages are awarded

in state or federal court. This Court should grant certiorari in this case to resolve this conflict.

CONCLUSION

Despite this Court's direction and guidance, the Oregon Supreme Court's atavistic standard for the review of punitive damages has created an unconstitutional precedent that lower courts in Oregon are bound to follow. In the instant case, the Oregon Court of Appeals affirmed a $22.5 million punitive damages award – 45 times the generous compensatory damages awarded – to a doctor who effectively misdiagnosed the plaintiff's condition, and then colluded with the plaintiff to blame the defendant-drug manufacturer. The appellate court ignored this Court's teachings in *BMW* and *Cooper Industries*, and instead applied the "rational juror" standard of review to affirm this enormous and disproportionate jury award of punitive damages. Until this Court intervenes, Oregon will continue to deprive parties of constitutionally adequate review of punitive damages awarded by juries. This Court should accept this opportunity to bring punitive damages review in Oregon in line with the federal Constitution. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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FREDERICK D. EDWARDS, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

As the Petition notes, Petitioners are Key Pharmaceuticals, Schering-Plough Corporation and Schering Corporation (collectively "Key"). They were appellants in the Oregon Court of Appeals, appealing from judgments entered against them as defendants in a negligence and strict products liability lawsuit brought by Paul R. Bocci, Jr., as guardian ad litem for Paul R. Bocci, III, an incapacitated individual, and as cross-claim defendants on the negligence and fraud cross-claims brought by defendant Frederick D. Edwards, M.D.

Respondent is Dr. Frederick D. Edwards, who, together with his employer, The Eugene Clinic, was dismissed as a defendant from Bocci's lawsuit before the case was submitted to the jury, but who remained as a cross-claim plaintiff in the trial court and a cross-claim respondent on appeal on his cross-claim against Key.

Initially, Bocci was also a respondent on Key's appeal, but Key settled with Bocci, and Key's appeal against him was dismissed before the Oregon Court of Appeals issued its first decision, *Bocci v. Key Pharmaceuticals, Inc.*, 158 Or. App. 521, 974 P.2d 758 (1999) (*"Bocci I"*).

Other parties listed as defendants in the caption in the Oregon trial and appellate courts were Miles, Inc., Miles Pharmaceutical Division, Legacy Health System, and Legacy Immediate Care Clinic, each of whom, on Bocci's motion in the trial court, was dismissed with prejudice.

Finally, although not a party to any of the proceedings below, the Department of Justice of the State of Oregon is listed as a judgment creditor for that portion of the punitive damages award to which the Criminal Injuries Compensation Account is entitled pursuant to Or. Rev. Stat. § 18.540 (1987). *See* Pet. App. 131a.

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BRIEF IN OPPOSITION

The Petition should be denied because the questions Key presents are premised upon a distorted presentation of the facts and record and upon arguments and objections that were neither pressed nor passed upon below, and because there are no compelling reasons warranting review by this Court. The Oregon Court of Appeals did not decide any important question of federal law in a way that conflicts with any decision of this Court, nor did it decide any new federal question that has not been, but should be, decided by this Court. To the contrary, the Oregon Court of Appeals, specifically applying decisions of this Court, conducted a *de novo* review and affirmed the punitive damages awarded in this case. *Bocci v. Key Pharmaceuticals, Inc.*, 178 Or. App. 42, 35 P.3d 1106 (2001) ("*Bocci II*"), Pet. App. 1a-11a.

OPINIONS BELOW

Judge William C. Snouffer of the Oregon Circuit Court for the County of Multnomah entered unreported judgments on the jury verdicts against Key on Bocci's negligence and strict products liability claims, Pet. App. 119a-126a, and on Dr. Edwards' negligence and fraud cross-claims in September 1994,[1] Pet. App. 127a-132a. Judge Snouffer also denied Key's motions for judgment notwithstanding the verdicts, new trial, and/or remittitur in an unreported "Opinion Denying Post-Trial Motions."[2] Opp. App. 1a-6a.

The Oregon Court of Appeals, sitting en banc, affirmed the trial court's judgments by an equally divided court.[3] *Bocci v.*

1. Under Oregon law, a physician may recover damages for harm caused by a drug manufacturer's negligent or intentional tort. *Oksenholt v. Lederle Labs*, 294 Or. 213, 656 P.2d 293 (1982).

2. The portion of that opinion relating to the trial court's review of the constitutionality of the punitive damages awards is only partially set forth in petitioners' appendix, Pet. App. 89a-91a, but is fully set forth in the appendix to this opposition, Opp. App. 1a-6a.

3. The en banc Court of Appeals divided only over issues related to the "Covenant Not to Enforce Judgment and Separate Loan (Cont'd)

Key Pharmaceuticals, Inc., 158 Or. App. 521, 974 P.2d 758 (1999) ("*Bocci I*") (Pet. App. 12a-70a). Key petitioned for review and the Oregon Supreme Court held the petition in abeyance pending its decision in *Parrott v. Carr Chevrolet, Inc.*, 156 Or. App. 257, 965 P.2d 440 (1998), *rev. allowed*, 328 Or. 418 (1999). After the Oregon Supreme Court issued its decision in *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001) (Pet. App. 133a-168a), setting forth the appropriate standards in Oregon for post-verdict judicial review of punitive damages awards following this Court's decision in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), it remanded this case to the Oregon Court of Appeals for further consideration in light of *Parrott*. *Bocci v. Key Pharmaceuticals, Inc.*, 332 Or. 39, 22 P.3d 758 (2001) (Pet. App. 71a-72a).

On remand, the Oregon Court of Appeals unanimously affirmed Dr. Edwards' punitive damages award, based upon its *de novo* review of the award in light of: (1) the Oregon Supreme Court's decision in *Parrott*; (2) this Court's decisions in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996), and *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) ("*Oberg*"); (3) the arguments of Key that were properly preserved; and (4) the facts as the jury was entitled to find them. *Bocci v. Key Pharmaceuticals, Inc.*, 178 Or. App. 42, 35 P.3d 1106 (2001) ("*Bocci II*") (Pet. App. 1a-11a). The Oregon Supreme Court denied Key's second petition for review. *Bocci v. Key Pharmaceuticals, Inc.*, 334 Or. 260, 47 P.3d 486 (2002) (Pet. App. 73a).

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Agreement" between Bocci, Dr. Edwards, and Dr. Edwards' insurer. The dissent did not discuss, criticize, or express any disagreement with the concurrence's resolution of the punitive damages issues Key raised. *See Bocci I*, 158 Or. App. at 774-83, Pet. App. 12a-70a. Because Key settled with Bocci before the Court of Appeals issued its decision, Bocci was dismissed from the appeal, and no issues directly related to the verdict in his favor were addressed in *Bocci I*. *Id.* at 523 n.2, 528, Pet. App. 14a, 20a.

COUNTERSTATEMENT OF THE CASE

In its Petition, as it did throughout the proceedings below, Key makes arguments that are premised on a distorted presentation of the issues, claims, and evidence in the case. Key still fails to acknowledge that the jury's verdicts and punitive damages awards for both Dr. Edwards and Bocci were the result of proof of Key's aggressive and, despite repeated FDA warnings, persistent promotion of its drug Theo-Dur without adequate warnings, and with material misrepresentations as to the drug's safety.

Key still attempts to blame Dr. Edwards, despite the jury's finding that he was zero percent at fault.[4] Key also ignores that the jury found clear and convincing evidence that Key acted with wanton disregard for the health, safety and welfare of others, and knowingly withheld or misrepresented information known to be material and relevant to the harms suffered.[5] Pet. App. 123a, 129a.

Under Rules 14.1(g) and 14.4, Key's failure to accurately set forth the facts clearly material to consideration of the

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4. Key also continues to minimize Dr. Edwards' damages and mischaracterize his claim as one only for emotional distress, ignoring that his claim was for injury to reputation with accompanying emotional distress for which the jury awarded him $500,000 in noneconomic compensatory damages. Incredibly, Key also now attempts to minimize Bocci's injury, characterizing it as "brain damage resulting in short-term memory loss," and ignoring the evidence of Bocci's severe brain damage that has left him severely disabled, with no short term memory, with a permanent seizure disorder, incapable of unassisted living or unsheltered employment, and, worst of all, cognitively aware that he is brain damaged, and for which the jury awarded over $9 million in total compensatory damages. While Key self-servingly minimizes Bocci and Dr. Edwards' damages, and characterizes Dr. Edwards' compensatory damages award as "extremely generous," Pet. at 11, it was for the jury, not Key, to decide what amounts were needed to appropriately compensate Bocci and Dr. Edwards for their injuries.

5. Despite that finding, Key, to the extent it makes any reference in its Petition to its own conduct, downplays its reprehensibility and suggests, that, at worst, it "overstated" Theo-Dur's safety. *See* Pet. at 2.

questions presented, including the facts relating to the reprehensibility of its conduct,[6] is a sufficient reason to deny Key's petition. Nevertheless, to counter Key's distorted summary of the facts, and mindful of the admonishment in Rule 15.2, Dr. Edwards offers the following summary, and adopts and incorporates the facts stated by the Oregon Court of Appeals in *Bocci I*, 158 Or. App. 521, Pet. App. 12a-70a.

A. Counter-Summary of the Facts

In September 1994, the jury returned verdicts against Key. On Bocci's negligence and strict liability claims, the jury found Key 65% and Bocci 35% at fault and awarded Bocci total compensatory damages of $9,033,305 and punitive damages of $35 million, the full amount that he had alleged and prayed for.[7] Pet. App. 121a-124a. On Dr. Edwards' negligence and fraud cross-claims, the jury found Key 100% and Dr. Edwards 0% at fault, and awarded Dr. Edwards $500,000 in noneconomic compensatory damages and $22.5 million in punitive damages, less than the $35 million he had alleged and prayed for. Pet. App. 127a-130a. The jury explicitly found clear and convincing evidence that Key had "acted with wanton disregard for the health, safety and welfare of others," and "in violation of applicable FDA regulations, knowingly withheld from or misrepresented to the FDA or prescribing physician information known to be material and relevant to the harm that plaintiff allegedly suffered." Pet. App. 123a, 129a. Ample evidence supported the jury's determinations.

Theophylline, a drug used to treat asthma, has a narrow therapeutic range — most patients need serum levels of at least

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6. As this Court made clear in *BMW*, 517 U.S. at 575, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."

7. Under Oregon law, a verdict may not exceed the amount alleged and prayed for in the complaint and juries are so instructed. *Wiebe v. Seely*, 215 Or. 331, 357, 335 P.2d 379 (1959); *Lovejoy Specialty Hosp., Inc. v. The Advocates for Life*, 121 Or. App. 160, 167, 855 P.2d 159, *rev. denied*, 318 Or. 97 (1993), *cert. denied*, 511 U.S. 1070 (1994).

10 mcg/ml to prevent symptoms, but levels above 20 mcg/ml are toxic. Ex. 8, p. 6; Tr. 1004-06, 1604. Saturation kinetics is a factor in theophylline toxicity,[8] Tr. 3028-30, as Key well knew, Ex. 81, pp. 26, 48; Ex. 340, p. 823, and toxicity can cause nausea, vomiting, headaches, diarrhea, tachycardia, seizures and death, Ex. 81, p. 16; Tr. 1163-64, 2084, 3088-89; *see Bocci I*, 158 Or. App. at 523-24. Historically, the need for frequent dosing and a peaks-and-troughs metabolic cycle made theophylline therapy difficult. Ex. 81, pp. iii, 13.

In the late 1970s, Key introduced Theo-Dur, a sustained-release (SR) theophylline. Ex. 8, p. 28; Ex. 81, p. iii, 34. From the late 1970s into the 1990s, Key promoted Theo-Dur as the superior and "*safe*" theophylline that maintained stable serum concentrations in "virtually all patients," avoided toxic peaks and protected against toxicity, and touted its "zero order absorption" and ability to flatten out the "peaks and troughs."[9] Tr. 1609-10, 1672-74.

On October 27, 1990, when he treated Bocci (and when Bocci suffered his brain-damaging seizures), Dr. Edwards did not know that ciprofloxacin ("cipro"), a quinolone antibiotic, could cause a dramatic decrease in theophylline elimination, or that a stat theophylline level should be obtained when patients, who had been on stable standard doses of Theo-Dur for years without problems, presented with nausea and vomiting. Tr. 1319-20. He did not know that such

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8. Saturation kinetics occurs when the enzymes that metabolize a drug become "saturated" so that the body cannot eliminate the drug at a normal rate, and the serum level increases disproportionately, Tr. 3001, 3029-32, which can occur when either the theophylline level gets very high or theophylline metabolism is somehow impaired. Tr. 984.

9. *E.g.*, Ex. 325 (1978 advertisement); Ex. 81 (May 1979 symposium); Ex. 80 (May 1985 advertisement describing Theo-Dur as unparalleled); Ex. 327 (1987 promotional materials); Ex. 307 (1987 promotional materials, including Dear Doctor letters); Ex. 326 (Theo-Dur 1988 promotional materials); Ex. 162 (1988 Dear Pharmacist letter); Ex. 23, p. 003391 (September 1989 promotional materials).

patients could get into emergency situations or suffer seizures absent a massive overdose.[10]

Key, however, had known these things for years. By 1979, Key knew that saturation kinetics could significantly elevate patients' theophylline levels and cause toxicity. Ex. 81, pp. 26, 48: Ex. 340, p. 823. Key's own vice president of sales and marketing thought that a stat level should be obtained for theophylline patients presenting with nausea and vomiting. CR 205, p. 12; *see* Tr. 1049-50.

In 1982, Key learned that Dr. Ellis, a previous Theo-Dur supporter, *see* Ex. 81, pp. 13-14, had expressed grave concerns about all SR theophylline products. *See* Ex. 304. In a November 1982 internal memo, Key reported that Dr. Ellis had become concerned about "the variable behavior of sustained release theophylline products," was convinced that none was "zero order," and had reported "children having [irreparable] seizures at serum levels of 18 and 19 mcg/ml [that] have turned these children into vegetables," and that he had been "asked to consult on a number of theophylline induced seizure cases." Ex. 304, pp. 1-2. Despite Dr. Ellis' reports of brain damaging seizures, Key chose not to warn, but instead continued to follow the advice of Dr. Weinberger[11] to promote Theo-Dur aggressively.[12]

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10. Tr. 1347-49, 1449-50, 1485-86, 1490-91, 1555. The way Key promoted Theo-Dur was a substantial factor in Dr. Edwards' understanding of the drug's safety and efficacy, Tr. 1549-50, 1552-54, and led him to believe that it was safe and benign on stable, conventional doses, with only mild transient side effects, Tr. 1348-49, 1550, 1553-54, 3800, and that seizures were associated only with massive overdoses, Tr. 1545-50, 3641. Dr. Edwards was not alone in those perceptions of Theo-Dur. *See* Tr. 515, 523-24, 542-43, 555, 1820-21, 2068-69, 2075-76, 2103-04, 2492, 2512-14, 2517-18, 2693-96.

11. Dr. Weinberger served on a panel advising the FDA about regulation of asthma medications. In 1984, it was publicly disclosed that he was a consultant to and had stock options in Key. Tr. 2682-86, 3378-79.

12. *See* Exs. 83, 87, 333; Tr. 2834, 2837. In 1981, Dr. Weinberger had advised Key to use advertising to deliver the "educational message"

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In 1983, the FDA told Key that it had not demonstrated Theo-Dur's clinical superiority because of zero order kinetics, and that such claims were not permitted in the absence of comparative clinical data. Ex. 328. There is no evidence that Key ever performed such clinical studies, even after this admonition and Dr. Ellis' reports. Instead Key's promotional materials continued to extol Theo-Dur's safety and zero order absorption. In February 1987, the FDA again objected to Key's claims in "Dear Doctor" letters and other promotional materials that Theo-Dur was superior to other theophylline products, and told Key to stop using a promotional video that made misleading claims, including a claim that treatment failures were directly attributable to substituting other products for Theo-Dur. *See* Ex. 3, Opp. App. 10a, 12a. Despite these admonitions, Key continued to heavily promote Theo-Dur as the only theophylline having zero-order absorption, and as maintaining stable therapeutic serum concentrations.[13]

An October 1987 internal memo shows that Key knew that "[d]uring the last couple of years there has been increasing documentation of the interaction between quinolone antibiotics [including cipro] and theophylline," causing a decrease in theophylline clearance, and a 44% increase in blood levels. Ex. 11. Despite knowledge that this information was important to practicing physicians,[14] Key did not disclose it and continued

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that Theo-Dur, Key's "current major asset," had an advantage over other slow release formulations. Ex. 87. In 1982, he told Key that, while "[t]he image of theophylline as an effective drug for chronic asthma is taking hold," its image "as a drug that can be administered without adverse effects is not," and urged Key to aggressively address what he characterized as "an important educational message" that "the frequency of adverse effects is less than with oral sympathomimetics." Ex. 83.

13. Ex. 307, pp. 001774, 001778, 001784, 001786, 001791; Ex. 326; Ex. 327, p. 001819; Ex. 337.

14. Ex. 15, p. 000027; Ex. 16, p. 000005; Tr. 853-55; CR 204, pp. 5, 8. Key knew that quinolones were likely to be prescribed for respiratory tract infections common among asthmatics. Ex. 11, p. 000123.

to promote Theo-Dur as safe.[15] Key also failed to report the quinolone antibiotic information to the FDA within 15 days of discovery, as it was required to do. 21 C.F.R. §§ 314.80(b) and (c)(1); Tr. 839-42. In March 1988, Key suggested to the FDA adding quinolones to the list of drugs that could interact to cause stabilized theophylline patients to potentially become toxic, Ex. 13, but failed to submit a proper amended application to do so to the appropriate division of the FDA, Exs. 14, 15; Tr. 818-25, and had to submit another application. Ex. 16; *see* Ex. 18.

Although the FDA told Key in March 1989 that it could add the cipro interaction at the next printing, Ex. 19; Tr. 825-26, Key did not make the PDR deadline, and the 1990 main volume of the PDR did not contain that interaction,[16] Ex. 43; *see* Tr. 845-46. Key could have notified, and no regulation would have prevented it from notifying, the medical community of the interaction at the time it submitted its application. Tr. 818-22. Although Key had told the FDA in June 1988 that the information was important and needed to be disseminated to the medical community as soon as possible, Exs. 15, 16, Key continued to send out promotional materials, *e.g.*, Exs. 6, 22-25; Tr. 835-39, 1647, without disclosing the cipro interaction, and did nothing to warn the medical community except to amend the package insert more than a year later.[17] Exs. 308, 318.

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15. *See* Ex. 326, p. 003193-94; Ex. 302, p. 003440; Ex. 6, pp. 003157, 003174.

16. The interaction was first included in the May 1990 PDR supplement. Ex. 318.

17. Key ultimately revised its package insert to add cipro to the list of drugs with which Theo-Dur could interact at the end of October 1989. Ex. 308. Key did not attach its amended October 1989 package insert to a promotion piece until June 1990, almost 15 months after the FDA approved adding the cipro warning. Tr. 1647-50; Ex. 26. Key took no other steps to inform physicians of the potential danger before October 27, 1990, and did not send any letters to physicians or have any sales or marketing campaign to inform doctors about the interaction and its dangers. Tr. 854-55, 1616-18; CR 205, p. 17.

The only "warnings" Key ever issued relating to Theo-Dur before October 27, 1990 by means other than its package insert were 1988 promotional items cautioning that prescribing or dispensing generic products *instead* of Theo-Dur could put patients at risk of toxicity. Ex. 6. The giving of those "warnings" reflected Key's major concern that it stood to lose $35,000,000 in Theo-Dur sales to generics in 1988 alone. Ex. 28; CR 205, p. 13. Even when the amended package insert adding cipro to the interaction list was finally printed in the May 1990 PDR supplement, it still provided no warning about the need to obtain stat blood levels, or the risk of death or brain-damaging seizures, for patients on stable doses of Theo-Dur who present with gastrointestinal symptoms. Tr. 1066, 1112-13, 1369-70, 1556.

Before October 1990, Key also had access to and knew of literature, summarizing thousands of theophylline toxicity cases (including a number of fatalities), reporting clinical toxicity as a "distressing[ly] common problem," Tr. 861-62, and stating that "[m]any clinicians may not be cognizant of continued reports of severe side effects that result in devastating harm to the patient." Ex. 306, p. 241; Tr. 857-59; CR 204, pp. 11-12. Yet, rather than warn physicians, Key persisted in falsely extolling Theo-Dur's purported "zero order absorption," superiority and safety into 1991, years after learning that such claims were at a minimum suspect and years after the FDA told it to stop.

In January 1989, the FDA issued a Notice of Adverse Findings, Ex. 3, Opp. App. 10a-16a, stating that Key had been employing claims of superiority that the FDA had previously described as "false and/or misleading," as well as "new false and/or misleading claims," "by a variety of promotional vehicles." Ex. 3, Opp. App. 9a-16a. The FDA concluded:

> . . . [Y]our firm has disseminated false and misleading labeling, which causes THEO-DUR to be misbranded . . . .
>
> . . . [Y]our firm has disseminated advertisements which cause THEO-DUR to be misbranded . . . due

> to the absence in such advertisements of a brief summary of side effects, contraindications, and effectiveness. . . .
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> * * *
>
> Agency experts rejected your firm's request to describe the product's absorption as "zero-order" in the product's labeling. We consider this claim false and/or misleading. . . .
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> * * *
>
> Your firm has employed falsehoods, misrepresentations, and innuendo, on a continuing basis and in the absence of any valid scientific data, in an effort to convince the medical and pharmaceutical communities that THEO-DUR is superior to all alternative controlled-release theophylline products. We have communicated such concerns in this regard to your firm previously.

Id. The FDA warned Key that misbranded products were subject to seizure and told it to "immediately cease promotion of THEO-DUR as discussed above." Ex. 3, Opp. App. 15a. Even then, Key did not tell its detailers to stop marketing zero order absorption, as the detailer assigned to Dr. Edwards continued to so market Theo-Dur through 1990. Tr. 1665-66. Even after February 1989, the FDA continued to criticize Key for making unfounded superiority claims for Theo-Dur. *See* Ex. 301.

Given Theo-Dur's potential for causing brain damaging seizures and death, and Key's false claims of Theo-Dur's safety and zero order absorption, it was likely at all times that serious harm would arise from Key's failure to warn patients and physicians, including Dr. Edwards, of Theo-Dur's potential dangers. There was ample evidence that strong medicine was needed to get Key's attention,[18] and that warranted a rational

18. As this Court noted in *BMW*, 517 U.S. at 576-77: "Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."

jury to, as the trial court put it, Opp. App. 6a, "assess an amount of punitive damages that would get defendants' attention in a way that the FDA had been unable to achieve for years." Key was long aware of Theo-Dur's dangers and that its claims of Theo-Dur's superiority, safety, and zero order absorption were misleading. Yet, Key continued to engage in false and misleading promotion of Theo-Dur for years after it had knowledge that its claims were seriously questioned, for years after the FDA expressed its disapproval, and even for years (through its detailers) after the FDA issued its Notice of Adverse Findings. Through its intense false and misleading promotional campaign, Key successfully convinced physicians, including Dr. Edwards, that conventional stable doses of Theo-Dur were safe and would produce no more than mild, transient side effects.[19]

Thus, when Bocci, after taking cipro prescribed elsewhere for a skin rash for several days, presented to The Eugene Clinic in October 1990 with symptoms of nausea, vomiting and diarrhea and saw Dr. Edwards, and Dr. Edwards learned that Bocci had been on a stable dose of Theo-Dur for a long time, Dr. Edwards did not diagnose theophylline toxicity, but instead diagnosed and treated Bocci for gastroenteritis and sent him home.[20] Several hours later, Bocci experienced violent seizures and was taken to the emergency room where ultimately, as a "long shot" and an "act of desperation," his theophylline level was checked and theophylline toxicity was diagnosed and treated.[21] Bocci, however, was left with permanent, severely disabling brain damage. Tr. 490, 506-07, 514, 542-43. Dr. Edwards also suffered damage, injury to his reputation and accompanying emotional distress.[22]

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19. Tr. 523-24, 1318-19, 1348-49, 1549-50, 1553-54, 2068-69, 2075-76; *see also* Tr. 1820-21.

20. Tr. 491-92, 1270-71, 1287-93, 1346-51, 1461, 1485-86, 1490-91, 1497, 1500-01; Ex. 39.

21. Tr. 491-94, 496-99, 500-01, 505, 507, 556, 561-62.

22. The evidence concerning Dr. Edwards' damages was not so limited as Key describes, Pet. at 4-5, nor were his damages limited to

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B. Key's Failure to Show That It Raised the Federal Questions Presented in the Courts Below.

Under Rules 14.1(g) and 14.4, Key's failure to include in its statement of the case "a specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised," and how they were raised and passed on by those courts, with specific references to the record, is sufficient reason to deny the Petition.

In its "Questions Presented," the first federal question Key posits regarding Dr. Edwards' punitive damages award is whether it is unconstitutionally excessive because "it is cumulative to a $35 million punitive damages award to the injured patient, imposed by the same jury, against the same defendant, to punish and deter the same course of conduct." Yet, although Key purports to show where it raised the federal questions sought to be reviewed in the Oregon courts below, Pet. at 7-8, Key's statement of the case is devoid of any citation

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"at best, only modest emotional distress," as Key asserts, Petition at 16. Dr. Edwards was very concerned and visited Bocci in the hospital after learning of Bocci's seizures and was initially relieved when it seemed Bocci would be all right. Tr. 2548-49. He later learned, however, that Bocci had suffered permanent brain damage and was suing him for malpractice. Tr. 1371, 2550. Dr. Edwards' colleagues saw the lawsuit reported in the papers, and people, aware of the case, asked Dr. Edwards about it. Tr. 2912, 2914, 2916. Dr. Edwards became concerned about how other doctors might view him, Tr. 2553-54, considered quitting the practice of medicine, Tr. 1372, became insecure with his medical knowledge, relied more heavily on specialists, referred patients to other physicians more often, and ordered more tests, Tr. 3650. He became concerned about reporting to the National Practitioner Data Bank and the effect of Bocci's case on his professional reputation, Tr. 2554, 2913, and, when the opportunity to move arose, he decided to leave Oregon and seek a fresh start. Tr. 1372, 2555-56. He also experienced intestinal discomfort (diarrhea, cramping and bloody stools) so severe that Crohn's disease was suspected. Tr. 2551-53.

to any place in the Oregon trial and appellate court records where its first federal question was raised.

The second federal question Key posits regarding Dr. Edwards' punitive damages award is whether it is unconstitutionally excessive because purportedly "the jury was permitted to impose each award [Bocci and Dr. Edwards' awards] as punishment for all of the harm actually or potentially caused throughout the United States by petitioner's conduct of a national marketing campaign." Although Key properly notes that the Oregon Court of Appeals in *Bocci II* rejected that argument,[23] Pet. at 10, Key fails to cite to any place in the trial court record where it raised that specific question, or where it sought to exclude evidence of its national marketing campaign or sought to limit, by instruction or otherwise, the jury's ability to consider such evidence in deciding punitive damages. Moreover, as Key notes, Pet. at 6, "[n]either Plaintiff nor Dr. Edwards presented evidence of any other injury caused by Key's marketing of Theo-Dur."

Key has also failed to show when in the Oregon appellate courts Key pressed the federal constitutional question it posits in its "Questions Presented" concerning the Mary Carter

23. As the Court of Appeals explained in *Bocci II*, 178 Or. App. at 49, Pet. App. 8a:

> . . . Key argues that its misleading marketing of Theo-Dur was part of a nationwide campaign and that the State of Oregon lacks any legitimate state interest in punishing its conduct outside of Oregon. We rejected a similar argument in *Axen v. American Home Products Corp.*, 158 Or. App. 292, 315, 974 P.2d 224, *adhered to on recons.* 160 Or. App. 19, 981 P.2d 340, *rev. den.* 329 Or. 357, 994 P.2d 124 (1999), *cert. den.* 528 U.S. 1136 . . . (2000). That case, like this one, concerned a punitive damage award involving misleading promotion of a prescription drug that led to damages to an Oregon plaintiff. In *Axen*, we held that the defendant 'was not punished for its promotional activities outside of Oregon — it was punished for failing to warn [the Oregon plaintiffs'] physicians' of a potential hazard of the drug involved. *Id.* at 315, 974 P.2d 224.

agreement.[24] Although Key asserts that it sufficiently preserved at trial and on appeal a federal question whether the trial court's handling of the Mary Carter Agreement deprived Key of its right to due process of law, Key cites only some sentences from its 26-page pre-trial Motion to Dismiss, or in the Alternative, to Have the Mary Carter Agreement Declared Void, Pet. App. 77a. *See* Pet. at 7-8 and n. 6. Even if Key preserved such a question in the trial court simply by asserting in a motion filed two months before trial that "Mary Carter Agreements create a trial environment which is so unfair to the nonsettling defendants as to deprive them of their constitutional right to a fair trial" and that the "Due Process Clause of the Fourteenth Amendment guarantees litigants a fair trial," Key cites no place where it argued in the Oregon appellate courts that the Mary Carter agreement or its handling in the trial court violated Key's constitutional due process rights.[25] Indeed, the only arguments by Key relating to the Mary Carter agreement which the Oregon Court of Appeals addressed in *Bocci I*, 158 Or. App. at 527-39, Pet. App. 19a-34a, were arguments concerning the validity and procedural handling of the Mary Carter agreement under Oregon, not federal, law.

REASONS FOR DENYING THE PETITION

Key's Petition should be denied, not only because of its failure to fully comply with Rules 14.1(g) and 14.4, but also because the questions Key presents are premised upon a distorted presentation of the facts and record below and upon arguments and objections that were neither pressed nor passed upon below, and because there are no compelling reasons warranting review by this Court.

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24. Key erroneously asserts, Pet. at 3, that Bocci and Dr. Edwards entered into the "Covenant Not to Enforce Judgment and Separate Loan Agreement," before Bocci filed this lawsuit. The signed agreement is undated, but the record shows that the lawsuit was filed on October 12, 1992, and that the agreement was not signed until the last week of October or the first two weeks of November 1992. Tr. 24-25, 1379-80.

25. What Key cites and quotes, Pet. at 8 n.7, from its opening appellate brief does not show that it raised on appeal a federal due process issue with respect to the agreement. *See* Pet. App. 97a.

The question Key presents as to the constitutionality of Dr. Edwards' punitive damage award is predicated upon three objections: (1) that the award is cumulative to Bocci's $35 million award, imposed by the same jury, against the same defendant, to punish and deter the same conduct; (2) that the jury was permitted to impose each award for all of the harm actually or potentially caused throughout the United States by Key's conduct of a national marketing campaign; and (3) that the appellate court relied upon a "rational juror" standard of review that is somehow contrary to the due process requirements articulated by this Court in *Oberg* and *BMW*. All three predicate objections are unfounded.

The first objection was not raised by Key in either the trial or the appellate courts below, and thus was not passed upon by the Oregon Court of Appeals in either *Bocci I* or *Bocci II*. The second objection, rejected by the Oregon Court of Appeals, *see* footnote 23, *supra*, was not raised in the trial court, and is factually incorrect. The third objection is both factually and legally incorrect and premised upon a distortion of Oregon's "rational juror" standard.[26]

The question Key presents as to the constitutionality of the Mary Carter agreement and its procedural handling by the trial

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26. Moreover, the third objection draws into question the constitutionality of Or. Rev. Stat. § 18.537(2) (1995), a statute which became effective after the trial in this case, and which provides that:

> If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.

Opp. App. 9a. Key, however, has failed to comply with Rule 29.4(c), which requires that:

> In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U.S.C. § 2403(b) may apply and shall be served on the Attorney General of that State.

court also was neither pressed below[27] nor passed upon by the Oregon Court of Appeals. The challenges Key made on appeal to the Mary Carter agreement and its procedural handling in the trial court were all based upon, and decided according to, state law, and involved no presentation of any federal question subject to review by this Court. Such state law issues fall outside the jurisdiction of this Court. *E.g.*, *Murdock v. Memphis*, 87 U.S. 590, 632-33 (1875).

The Oregon Court of Appeals did not decide any important question of federal law in a way that conflicts with any decision of this Court, nor did it decide any new federal question that has not been, but should be, decided by this Court. To the contrary, the Oregon Court of Appeals in *Bocci II* properly applied this Court's decisions in *Cooper Industries*, *BMW*, and *Oberg*, conducted a *de novo* review of the punitive damages award in light of the arguments made by Key that were properly preserved, the facts as the jury was entitled to find them, and the *BMW* guideposts, and affirmed the punitive damage award. *Bocci II*, Pet App. 1a-11a. The Oregon Court of Appeals' rejection in *Bocci I*, 158 Or. App. at 527-39, Pet. App. 19a-34a, of Key's state law challenges to the Mary Carter agreement and the trial court's procedural handling of it, does not give rise to any federal constitutional due process question that needs to be decided by this court.

Finally, although Key has torturously tried to recast its issues to make them appear to resemble issues presented in *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289 (*cert. granted* June 3, 2002)), the issues preserved and passed on below bear no resemblance to the issues involved in *State Farm*. There is no reason to withhold action on Key's petition pending a decision in *State Farm*.

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27. Many of Key's specific Mary Carter-related challenges were not even adequately preserved in the trial court.

A. Contrary to Key's Assertion, This Case Does Not Present Important Federal Questions Regarding Application of This Court's Decisions to Multiple Punitive Damages Awards Based Upon Nationwide Conduct.

Contrary to Key's assertions, Pet. at 15-16, this case is not "a case where a defendant has been subjected to multiple punitive damages awards for the same conduct," nor is it an appropriate vehicle for this Court to address the issue Key posits of "whether the due process clause allows states to use punitive civil damages to inflict multiple monetary punishments for the same offense."

First, Key did not raise that issue below and thus the Oregon courts did not pass upon it. Generally, this Court will not review a federal law issue arising out of state court litigation that was not pressed or passed on below. *E.g.*, *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 463-64 (1993); *Illinois v. Gates*, 462 U.S. 213, 217-23 (1983).

Second, this case is not now nor has it ever been about "multiple monetary punishments" or "cumulative" punitive damages awards. There is no evidence in this case that Key has received multiple punishments for the same conduct that gave rise to the punitive damages awarded in this case, or that anyone other than Bocci or Dr. Edwards has sued Key for the same conduct. As the trial court noted, Opp. App. 5a, "[d]efendants offered no evidence in this case that they had received 'other punishment' as a result of proceedings similar to this case."

Key's speculative assertion, Pet. at 14, that it faces "a very substantial risk of multiple, redundant, and excessive punishment" because it markets products nationwide hardly makes this case an appropriate vehicle to address an issue that was not raised or briefed in the courts below. If Key had evidence of actual or potential multiple punishments, it could and should have offered it at trial under Or. Rev. Stat. § 30.925(3)(g), which authorizes the jury and the reviewing court to consider "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not

limited to, punitive damage awards to persons in situations similar to the claimant's . . ."

Moreover, although Key complains, Pet. at 15, that "[h]ere, a single jury, in a single case, awarded punitive damages to two different claimants, for the exact same conduct," Key cites no authority that suggests that allowing a jury to award punitive damages in a single case to each of two claimants who were both injured by the defendant's reprehensible conduct gives rise to a due process concern over multiple punishments for the same conduct.[28] Indeed, even Key acknowledges, that "historically, punitive damages typically were awarded in cases involving harm to one *or a few* individuals."[29] Pet. at 14 (emphasis added). In this case, Key is no longer even subject to two punitive damages awards or punishments, as Bocci's judgment was vacated after Key settled with Bocci on appeal.

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28. Key suggests, Pet. at 15 and n.12, that Oregon's statutory entitlement to a portion of the punitive damages awards implicates the Eighth Amendment excessive fines clause. Yet, at no time did Key ever raise any such issue in the appellate courts below.

29. Key also complains, Pet. at 18-19, that the trial court gave the jury two special verdict forms, one asking what Bocci's punitive damages were and the other asking what Dr. Edwards' punitive damages were, and each having a blank space to fill in the award and an instruction that the award could not exceed $35 million. Key, however, did not except at trial to the special verdict forms on those bases and did not assign error or argue on appeal that the special verdict forms somehow permitted an impermissible multiplicity of awards. Under Oregon law, an appellate court will not consider objections to jury instructions or special verdict forms to which exceptions were not made at trial, *Berhanu v. Metzger*, 119 Or. App. 175, 177, 850 P.2d 373, *rev. denied*, 318 Or. 60 (1993), *cert. denied*, 511 U.S. 1106 (1994), and an exception on one ground does not preserve error on another ground. *Propp v. Long*, 129 Or. App. 273, 277, 879 P.2d 187, *rev. denied*, 320 Or. 271, 277 (1994). Moreover, in order to have an Oregon appellate court consider an issue, it must be assigned as error. Or. Rule App. Proc. 5.45(2); *Lutz v. State By and Through Carey*, 130 Or. App. 278, 283, 881 P.2d 171 (1994).

1. The Oregon courts did not impermissibly permit disproportional and cumulative punitive damages awards.

In *BMW*, 517 U.S. at 568, this Court held that review of a punitive damages award for gross excessiveness begins with identification of the state interests that a punitive damages award is designed to serve. This Court then identified three "guideposts" courts are to consider when evaluating whether a defendant has received fair notice of the magnitude of the punitive damages award that might be imposed: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the punitive damages award and the actual or potential harm inflicted; and (3) the civil and criminal sanctions provided for comparable misconduct. *Id.* at 574-85. In its Petition Key completely ignores the first guidepost ("the degree of reprehensibility"), ever though the *BMW* court made clear that it is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Id.* at 575.

Key asserts, Pet. at 20, that Dr. Edwards' punitive damages award "is not justified by Oregon's legitimate interest in punishment and deterrence of wrongful conduct." While Key's assertion is not all that surprising given Key's erroneous view that its conduct was not all that wrongful, it cannot seriously be contended that Dr. Edwards' punitive damage award does not advance legitimate and proper state interests. As the court in *Axen v. American Home Prods. Corp.*, 158 Or. App. 292, 319-20, 974 P.2d 224, *adhered to as modified*, 160 Or. App. 19, 981 P.2d 340, *rev. denied*, 329 Or. 357 (1999), *cert. denied*, 528 U.S. 1136 (2000), explained, Oregon has an interest "in protecting Oregon residents against harm caused by the failure to give them and their physicians adequate warning of the dangerous side effects of prescription drugs," "in avoiding the costs of providing health care to patients harmed by mislabeled medications," and "in preventing the loss of productive members of society." As the court further explained in *Bocci II*, 178 Or. App. at 49, Pet. App. 8a-9a: "The state's interests are identical, whether the harmed party receiving the award is a patient or a physician."

Contrary to Key's insistence, Pet. at 20, that trial and appellate courts must focus on the ratio of a given plaintiff's punitive damages to that plaintiff's actual damages, this Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *BMW*, 517 U.S. at 582.

> [B]oth State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

TXO, 509 U.S. at 460 (emphasis in original). Thus, the proper inquiry under the second *BMW* guidepost is "whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that has actually occurred." *BMW*, 517 U.S. at 581 (quoting *TXO*, 509 U.S. at 460, and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991) (emphasis in original).

Contrary to Key's argument, Pet. at 17, the Oregon Court of Appeals, when it declined to review Dr. Edwards' punitive damage award independently of Bocci's award under the second *BMW* guidepost, was not unwilling to probe the basis of the jury's verdict; it was unwilling to review an issue that Key had failed to preserve and in fact had waived. *See Bocci I*, 158 Or. App. at 773, Pet. App. 46a. As the Court explained in *Bocci II*, 178 Or. App. at 51, Pet. App. 11a, Key failed to preserve in the trial court the issue that the ratio of punitive damages awarded to Dr. Edwards to the compensatory damages awarded to Edwards is excessive, having "argued only that the *total* award

to Bocci and Edwards was excessive."[30] The court further observed that "[n]othing in *Cooper Industries* suggests that appellate courts are required to consider unpreserved issues." *Id.*

The Court of Appeals was not wrong in concluding that Key failed to preserve the issue. In its post-trial motions, Key asked the trial court to "declare the entire amount of the punitive damages awarded to Plaintiff and Dr. Edwards excessive." Preceding the excerpt from its reply on post-trial motions that Key quotes in its Petition at page 9,[31] Key argued that:

> In their Responses, Plaintiff and Dr. Edwards deal separately with their respective punitive damage awards. However, this Court must consider aggregating the punitive damage awards to determine whether, in combination, they exceed the maximum amount tolerable under the Due Process Clause because both awards are premised on the same factual basis and because the jury had before it all of the evidence pertaining to the totality of the wrongful conduct sought to be punished. . . .[32]

Even if Key had preserved the argument, nothing in this Court's decisions limits the proportionality review to whether there is a reasonable relationship between Dr. Edwards' punitive damages and his actual damages, or requires the reviewing court to ignore actual or potential harm to others.

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30. The court noted that the ratio of the combined punitive to compensatory awards was roughly 10:1. *Id.* at 51 n.3, Pet. App. 11a.

31. That excerpted quote appears nowhere in Key's opening appellate brief, its Appendix, its appellate reply brief, or its reply Appendix, notwithstanding the requirements of Or. Rule App. Proc. 5.45(4), which, at the time Key's briefs were filed, provided that "Each assignment of error . . . must set out verbatim the pertinent portions of the record, if it relates to a specific ruling that is being challenged."

32. Even after Key's quoted excerpt, Key stated: "Given the lack of any substantial evidence supporting the factors set out in ORS 30.925(3), the combined punitive damage awards of $57.5 million were clearly contrary to the weight of the evidence and should be remitted . . ."

Key argues that a comparison of the punitive damage to compensatory damage ratios of the awards to Bocci and Dr. Edwards shows how grossly disproportionate Dr. Edwards' award is. *See* Pet. at 16. Key, however, ignores that the jury, instructed that it could not award Bocci more than $35 million in punitive damages, awarded Bocci the maximum amount it could. Pet. App. 124a. Any comparative disproportion between the proportion of Bocci's punitive damages to his actual damages, and the proportion of Dr. Edwards' punitive damages to his actual damages, is likely due to the fact that the jury was constrained by the court's instruction not to award Bocci any more than $35 million.

2. The Oregon courts did not impermissibly rely upon out of state conduct to justify the punitive damages awards.

Contrary to Key's assertion, Pet. at 20, this case presents no issue concerning "states imposing punitive damages for consequences outside their borders." As even Key has acknowledged: "Neither Plaintiff nor Dr. Edwards presented evidence of any other injury caused by Key's marketing of Theo-Dur." Nor is this case like *BMW* where the jury's verdict reflected an amount of punitive damages "based in large part on conduct that happened in other jurisdictions" but that was *lawful* in those other jurisdictions. *See BMW*, 517 U.S. at 572-73.

Just because Key's reprehensible conduct occurred as part of a long-term nationwide marketing campaign does not mean that the jury's punitive damage award impermissibly punished Key for out-of-state conduct.[33] Indeed, the Oregon Court of

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33. Key's argument in this regard, if accepted, would mean that individuals or entities who engage in reprehensible misconduct as part of nationwide campaigns would be insulated from the deterrent effect of significant punitive damages awards in any one state where proven injury occurred, because the possibility exists that many more people in many other states might sustain similar injuries as a result of the same

(Cont'd)

Appeals explicitly rejected such an assertion, quoting with approval the holding in *Axen*, *supra*, 158 Or. App. at 315, that the defendant before it "'was not punished for its promotional activities outside of Oregon — it was punished for failing to warn [the Oregon plaintiffs'] physicians' of a potential hazard of the drug involved." *Bocci II*, 178 Or. App at 49, Pet. App. 8a.

Consideration of the profitability of Key's misconduct does not mean that Key was being punished for out-of-state conduct. Key's profit motive is certainly relevant to the degree of reprehensibility of its misconduct, and the profitability of Key's conduct is one of the statutory factors in Oregon to be considered in assessing punitive damages. Consideration of Key's "gargantuan size"[34] also does not mean that Key was being punished for extraterritorial conduct. *See* Pet. at 21-22. Indeed, this Court, in *TXO*, 509 U.S. 462 n. 28, rejected contentions that admission of evidence of defendant's alleged wrongdoing in other parts of the country and of defendant's "impressive net worth" allowed the jury to base its award on impermissible passion and prejudice, stating: "Under well-settled law, . . . factors such as these are typically considered in assessing punitive damages."

(Cont'd)
reprehensible wrongful conduct. If accepted, such an argument would result in the absurdity that, because Key engaged in such reprehensible misconduct with so much potential for severe harm to so many potential victims nationwide, Key should be subjected to lesser, not greater, punitive damages.

34. Key asserts, Pet. at 22, that the trial court's "emphasis on Key's 'gargantuan size,' without connecting that size in any way to its market share in Oregon," reflects punishment for out-of-state behavior. Key's argument, besides being wrong, ignores the fact that Key chose not to present any evidence of its market share in Oregon or the profitability of its Oregon sales of Theo-Dur. As the court noted in its Opinion Denying Post-Trial Motions: "Defendants made the tactical choice to present no financial data for the jury to consider in assessing punitive damages; thus the range of alternative measurements is limited." Opp. App. 3a.

3. Oregon's "rational juror" inquiry is not in conflict with this Court's decisions in *Oberg*, *TXO*, *BMW*, or *Cooper Industries*.

Key's assertions, Pet. at 22-26, that Oregon's "rational juror" standard of review is somehow inconsistent with the standards of *de novo* review identified by this Court, are factually and legally incorrect and premised upon a distortion of Oregon's "rational juror" inquiry. Contrary to Key's assertion, Pet. at 23, Oregon's "rational juror" standard is not simply a "sufficiency of the evidence standard" under which "a jury's punitive damages verdict would not be disturbed so long as there was any evidence to support it."

In holding that "the rational juror inquiry remains the standard of post-verdict review of punitive damages in Oregon for excessiveness," the Oregon Supreme Court in *Parrott*, 331 Or. at 554, Pet. App. 153a-154a, explained that: (1) "the rational juror inquiry is merely one of the 'different formulations' of the 'grossly excessive' standard adopted by the Supreme Court;" (2) "the rational juror standard is compatible with and does not differ practically from [*BMW v.*] *Gore's* gross excessiveness inquiry;" and (3) "[*BMW v.*] *Gore* has not 'superceded' the rational juror standard that this court articulated in *Oberg* (state)." Moreover, as the Oregon Court of Appeals in *Bocci II*, 178 Or. App. at 51, Pet. App. 10a, correctly pointed out, "[n]othing in *Cooper Industries* calls into question the 'rational juror' standard of review announced by the Oregon Supreme Court in *Oberg*."

Oregon's "rational juror" standard is not, as Key implies, Pet. at 24, akin to the "rational basis" standard (the standard of review for state economic legislation) advocated in *TXO*, 509 U.S. at 455-56, that would have rendered acceptable "*any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large." A punitive damage award that does not sufficiently satisfy the Oregon statutory and common law factors that allow for an award of punitive damages in a given type of case, or that does not

comport with a legitimate state interest or the *BMW* guideposts, would not be within the range that a rational juror could award and would not survive Oregon's "rational juror" inquiry.

Contrary to Key's assertions, Pet. at 25, the Oregon appellate courts have not ignored the teachings of this Court in *BMW* and *Cooper Industries* or left punitive damages "to the sole unfettered discretion of the judge and jury." To the contrary, the Oregon Court of Appeals in *Bocci II* conducted a *de novo* review in light of: (1) the Oregon Supreme Court's decision in *Parrott*; (2) this Court's decisions in *Cooper Industries*, *BMW*, and *Oberg*, including the *BMW* guideposts; (3) the arguments of Key that were properly preserved; and (4) the facts as the jury was entitled to find them,[35] and determined that Dr. Edwards' punitive damages award was not grossly excessive or unconstitutional.

B. This Case Does Not Present A Federal Question Concerning Mary Carter Agreements.

Key asserts, Pet. at 26-27, that the Mary Carter agreement and the trial court's handling of it deprived Key of due process of law under the Fourteenth Amendment. Even if Key had pressed that issue below, which it did not, Key's assertion distorts the law and record, and is meritless. Neither the Mary Carter agreement[36] nor the trial court's handling of it presents a federal question. If it did, this Court would become a court of last resort for every state law procedural and evidentiary error that an imaginative aggrieved party argues deprived it of a fair trial.

Contrary to Key's assertions, Pet. at 5-6, 26-27, 29, Dr. Edwards was not a "stealth plaintiff" against Key, nor was Key deprived of adequate procedural protections. The jury

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35. Even Key concedes, Pet. at 24, that, under *Cooper Industries*, "a reviewing court must accept the jury's findings of fact unless they are clearly erroneous."

36. Mary Carter agreements are not invalid or against public policy under Oregon law. *Grillo v. Burke's Paint Co.*, 275 Or. 421, 427, 551 P.2d 449 (1976); *Bocci I*, 158 Or. App. at 528-29, Pet. App. 21a.

was not kept in the dark about Dr. Edwards' interest or bias.[37] The trial court told the jury about the agreement, that it contained a schedule for repayment depending on Bocci's recovery against Key, that Dr. Edwards had a financial interest in the outcome of Bocci's claims against Key because it would affect the amount that Dr. Edwards would have to pay, and that Dr. Edwards had his own claims, including a claim for punitive damages, against Key. *See Bocci I*, 158 Or. App. at 532-33, Pet. App. 25a-26a. Key had the opportunity but elected not to propose additional instructions on the agreement. Tr. 139, 150, 1380-81.

Under Oregon law, Key was not entitled to have the agreement admitted into evidence when it contained inadmissible references to Dr. Edwards' liability insurance and to potential settlement amounts (from $200,000 to $1,000,000 depending on the outcome of Bocci's claims against Key).[38] *See Bocci I*, 158 Or. App. at 533-36, Pet. App. 28a-31a. Nor was Key prevented from cross-examining Dr. Edwards about the agreement. The trial court merely sustained an objection when Key essentially repeated a question about financial exposure that had just been asked and answered, and then told Key "no" when Key asked if he could explore it. The record shows in context that Key's questions about financial exposure were aimed at pointing out the settlement amount and

37. Key was not precluded from referring to the agreement in opening, Tr. 148-49, although it was precluded from referring to the payment sequencing and insurance matters, Tr. 336, 437-38, and Key's closing argument about the agreement was unrestricted in the extreme, Tr. 4131-35, 4216-19.

38. Although claiming that the entire agreement should have been admitted, Key argued in the trial court that a redacted form of the agreement (that is not of record) should be admitted, deleting certain recitals, but not deleting the inadmissible references to liability insurance and potential settlement amounts. *Bocci I*, 158 Or. App. at 535-36, Pet. App. 30a-31a. A party who attacks the exclusion of an exhibit that contains some irrelevant material has "the burden of excising the irrelevant portions to preserve the claimed error." *Fazzolari v. Portland School Dist.*, 78 Or. App. 608, 614, 717 P.2d 1210 (1986), *aff'd on other grounds*, 306 Or. 1, 760 P.2d 1317 (1988).

Dr. Edward's insurer's participation. Tr. 89-90, 144-45, 151, 436-37, 2937. *See Bocci I*, 158 Or. App. at 538, Pet. App. 33a. Key made no offer of proof as to what evidence of bias it would have elicited on further cross-examination of Dr. Edwards about the agreement.[39] *See Bocci I*, 158 Or. App. at 536-39, Pet. App. 31a-34a.[40]

The essence of Key's complaints about the agreement is that it somehow rendered the trial unfair because Bocci and Dr. Edwards had a common interest in "pointing the finger" at Key. That interest existed, however, with or without the agreement, because it was Key's theory that Bocci and Dr. Edwards, not Key, were at fault, and because both Bocci and Dr. Edwards had claims against Key. Just as codefendants often cooperate for the shared purpose of defeating the claims of a single plaintiff, a trial in which a plaintiff and co-defendant both "point the finger" at another defendant is neither uncommon or qualitatively less fair. *See Bocci I*, 158 Or. App. at 532, Pet. App. 25a. Key's complaints about the Mary Carter agreement do not present any federal questions so as to warrant this Court's review.

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39. Key's "offer of proof," which Key failed to set forth verbatim until its reply brief did not show what evidence Key would have elicited from Dr. Edwards, but only what arguments Key would have made about the agreement, Tr. 2935-40, most of which would have been impermissible as relating to settlement amount or Dr. Edwards' liability insurer. Nevertheless, Key told the jury in closing argument that Dr. Edwards' payment to Bocci should end the case. Tr. 4217.

40. Key complains that it was not allowed to cross-examine some of Bocci's witnesses to try to establish Dr. Edwards' culpability. Key raised one assignment of error in that regard as to one witness and assigned it as error only as against Bocci, not Dr. Edwards. Thus, the Court of Appeals did not consider that argument. Moreover, Key's questions would have been beyond the scope of direct, and Key had its own physician expert who offered criticism of Dr. Edwards. Tr. 3665-72.

C. The Court Should Not Withhold Action Pending A Decision in *State Farm*.

Key suggests, Pet. at 13, that the Court "may find it appropriate to withhold action" on Key's petition until after the Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289. Despite Key's distorted presentation of the issues and record, the issues preserved and passed upon by the Oregon Court of Appeals in this case bear no resemblance to the "Question Presented" in the *State Farm* petition, which is:

> Whether the Utah Supreme Court, in direct contravention of this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and fundamental principles of due process, committed constitutional error by reinstating a $145 million punitive damage award that punishes out-of-state conduct, is 145 times greater than the compensatory damages in that case, and is based upon the defendant's alleged business practices nationwide over a twenty year period, which were unrelated and dissimilar to the conduct by the defendant that gave rise to the plaintiffs' claims?

The Petition in *State Farm* identifies numerous discrete and separate examples of dissimilar and unrelated practices that were admitted into evidence even though, according to State Farm, the plaintiffs made no showing that the practices were unlawful in the states where they were performed.

In contrast, here, while Key's fraudulent promotion of Theo-Dur occurred as part of a long-term nationwide marketing campaign, there was no evidence of dissimilar or unrelated conduct that was *lawful* in other states. Even according to Key, Pet. at 6, there was no evidence introduced by Bocci or Dr. Edwards of other injuries caused by Key's fraudulent promotion. Moreover, Key's misconduct violated FDA regulations and was *unlawful* nationwide.

Finally, whether the 145:1 ratio of punitive to compensatory damages in State Farm is constitutionally acceptable or not is dependent upon the facts of *that* case. The comparison of punitive damages to the actual and potential harm resulting from a defendant's wrongful conduct is necessarily fact-specific, which is why this Court has consistently resisted applying any mathematical formula.

Because this case, which is now roughly eight years out from entry of judgment, bears no resemblance to *State Farm* and does not share the same issues, this Court should not withhold action until *State Farm* is decided.

CONCLUSION

For the foregoing reasons, this Court should deny Key's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION DENYING POST-TRIAL MOTIONS

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

Case No. A9210-07050

PAUL R. BOCCI, JR., Guardian ad Litem for PAUL R. BOCCI, III, an incapacitated individual,

Plaintiff,

v.

KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation; SCHERING CORPORATION, a foreign corporation; MILES, INC. an Indiana corporation; LEGACY HEALTH SYSTEM, an Oregon corporation; LEGACY IMMEDIATE CARE CLINIC; FREDERICK D. EDWARDS, M.D.; and THE EUGENE CLINIC, a partnership,

Defendants.

FREDERICK D. EDWARDS, M.D.,

Cross-Claim Plaintiff,

v.

KEY PHARMACEUTICALS, INC., a foreign corporation; SCHERING-PLOUGH CORPORATION, a foreign corporation; SCHERING CORPORATION, a foreign corporation,

Cross-Claim Defendants.

Appendix A

OPINION DENYING POST-TRIAL MOTIONS

The defendants' Motions for New Trial, Remittitur, and for Judgment N.O.V. came before me on October 28, 1994. . . .

For the reasons stated below, all of defendants' post-trial motions are *denied*.

* * *

PUNITIVE DAMAGES

The jury in this case assessed punitive damages against defendants in the sum of $57.5 million; $35 million to plaintiff and $22.5 million to Dr. Edwards. With respect to punitive damages, defendants attack the jury's verdict with all barrels. They move for a Judgment N.O.V., contending there was no evidence to prove plaintiff's and Dr. Edward's entitlement to punitive damages; they ask for a Judgment N.O.V. on the basis that punitive damages in Oregon are unconstitutional as a matter of state law; they move for a new trial on the basis of insufficient proof; and in the alternative they ask for a remittitur. All of those motions are *denied*.

* * *

The jury's assessment of punitive damages in the sum of $57.5 million is not "grossly excessive" and does not violate federal due process. The award is entirely reasonable under the facts of this case and is appropriately proportional in relation to the damages caused when compared with defendants' financial condition. A review of the amounts assessed and the standards the jury was instructed to apply shows that there is no basis to order a new trial or to grant a remittitur.

Appendix A

The evidence was that defendants' 1993 sales were approximately $4,300,000,000, and 1993 profits were approximately $1,100,000,000. The punitive damages assessed in this case approximate 5 percent of defendants' 1993 profits, or 1.3 percent of 1993 sales. The jury also heard that the market value of defendants' companies ranges from $10.1-13.9 billion. Assuming a median market value of $12.0 billion, the punitive damages in this case equal .00479% of that 1993 market value. Given the gargantuan size of defendant's companies, it cannot be said that the amount of punitive damages in this case "shocks the conscience" of the court. (Defendants made the tactical choice to present no financial data for the jury to consider in assessing punitive damages; thus the range of alternative measurements is limited.)

Although defendants object to using the financial health of their corporations as a measuring standard, ORS 30.925(3)(f) clearly provides that the "financial condition of the defendant" is one of the criteria upon which punitive damages "shall be determined and awarded."

The jury in this case was asked specifically whether defendants' conduct showed "wanton disregard for the health, safety and welfare of others." They answered in the affirmative. There was evidence in the record to support their decision, not the least of which is Ex. #3 and the pattern of using the FDA labeling process as a shield to try to avoid liability and to delay dissemination to the medical community about the dangers of Theo-Dur and dangers of adverse inter-reactions with other drugs.

The criteria for assessing punitive damages in these kinds of cases are outlined in ORS 30.925(3). I am aware of no statutory interpretation which says that there must be proof of each of the criteria before punitive damages may be awarded. The statute is a descriptive list rather than a mandatory list.

Appendix A

ORS 30.925(3)(a) provides that one criterion is the likelihood that serious harm would arise from defendants' misconduct. Defendants argue that this criterion cannot apply in a prescription drug case because all prescription drugs are dangerous and will cause serious harm if not used according to FDA approved package inserts and the medical advice of a prescribing physician. What is at issue here, however, is defendants' failure to warn the medical community honestly about the dangerousness of Theo-Dur. Plaintiff's brain damage is obviously "serious harm." The jury had evidence from which it reasonably could infer that defendants' failure to inform the FDA and warn the medical community made it likely that harm such as plaintiff's would arise from defendant's misconduct.

ORS 30.925(3)(b) states that another criterion is the "degree of the defendant's awareness of that likelihood." There was evidence from which the jury could infer reasonably that defendants have known for years that their advertising to the medical community was false and misleading. There was evidence from which the jury could infer that, at least by 1987, defendants became aware of the potential for adverse inter-reactions between ciproflaxacin and Theo-Dur, but that defendants engaged in a delaying tactic in the guise of applying to the FDA for "permission" to alter the package insert while taking the position that they could not warn the medical community without approval from the FDA. The jury could infer that this was a deceptive tactic. There was evidence in the case that defendants could have warned the medical community about these dangers immediately and without "permission" from the FDA.

ORS 30.925(3)(d) provides that other criteria are the "duration of the misconduct and any concealment of it." ORS 30.925(3)(e) states that further criteria are the "attitude and conduct of the defendant upon discovery of the misconduct."

The comments made in the previous paragraph about violation of Sec. (3)(b) apply equally here. There was evidence that for eight years defendants had promoted its drug as safe and as having "zero-order absorption," and that they had misled the medical community about the safety of its drug since 1978. There was evidence from which the jury could conclude that defendants have aggressively resisted informing the medical community about adverse reactions, while at the same time aggressively promoting "Dear Pharmacist" letters when possible financial losses might occur as a result of adverse publicity.

ORS 30.925(3)(c) says that another criterion is the "profitability" of the defendants' misconduct. Defendants argue that there was no proof on this point. They assert that statutory "profitability" is limited to the difference between profits actually earned and the lesser profits that would have occurred if additional warnings had been added earlier. They say that plaintiff and Dr. Edwards provided "no evidence regarding the number of sales that would have been lost had those warnings been issued." (Defendants' Motion, p. 50) They argue that such evidence would be speculative. Indeed such evidence would be speculative in the absence of proof. However, defendant did not object at trial that there was no proof that fit this narrow interpretation of the statute. Plaintiff offered evidence about defendants' profits; defendants did not challenge those figures or demand that they be confined within the constraints that they now insist upon.

ORS 30.925(3)(g) provides that another criterion is the "total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct . . ." Defendants offered no evidence in this case that they had received "other punishment" as a result of proceedings similar to this case. This criterion was not relied upon by any of the parties and does not require the court to act with respect to it.

Appendix A

As stated by Justice Kennedy, concurring in *TXO Production Corp. v. Alliance Resources Corp.*, __ US __, 113 SCt 2711, 725 [sic] (1993), punitive damages must reflect "a rational concern for deterrence and retribution" rather than "bias, passion or prejudice by the jury." The punitive damages assessed against defendants in this case do reflect a rational concern for deterrence. There is nothing in this case that reflects bias, passion or prejudice by the jury toward the defendants. Rather, the jury engaged in a dispassionate effort (they deliberated for approximately 8 hours) to decide the issues in the case and to assess an amount of punitive damages that would get defendants' attention in a way that the FDA had been unable to achieve for years.

There is nothing presented by defendants that persuades me that they are entitled to a new trial or to a remittitur of the punitive damages assessed by the jury.

APPENDIX B — OR. REV. STAT. § 30.925 (1979)

ORS 30.925

Punitive damages. (1) In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is [sic] sought has shown wanton disregard for the health, safety and welfare of others.

(2) During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.

(3) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to

persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected. [1979 c. 866 § 3]

[Note: Or. Rev. Stat. § 30.925 was amended in 1995, c.688 § 4. With that amendment, Or. Rev. Stat. § 30.925(3) became Or. Rev. Stat. § 30.925(2).]

APPENDIX C — OR. REV. STAT. § 18.537 (1995)

ORS 18.537

Standards for award of punitive damages; required review of award by court; additional reduction of award for remedial measures. (1) Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

(2) If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.

(3) In addition to any reduction that may be made under subsection (2) of this section, upon the motion of a defendant the court may reduce the amount of any judgment requiring the payment of punitive damages entered against the defendant if the defendant establishes that the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages. In reducing awards of punitive damages under the provisions of this subsection, the court shall consider the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages. [1995 c.688 §2]

APPENDIX D — TRIAL EX. 3, NOTICE OF ADVERSE FINDINGS

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

JAN 27 1989

Robert P. Luciano
Chairman and Chief Executive Officer
Schering-Plough Corporation
1 Giralda Farms
Madison, NJ 07940

Notice of Adverse Findings

Dear Mr. Luciano:

Please refer to your current promotional campaign for THEO-DUR (theophylline anhydrous). We have conducted a review of this campaign after receiving an industry complaint. Although we informed your firm by letter dated February 26, 1987 of our objections to false and/or misleading claims of superiority for THEO-DUR relative to competing products, we find that your firm continues to employ claims we have previously described as false and/or misleading as well as new false and/or misleading claims.

These claims are being disseminated by a variety of promotional vehicles, including "Dear Doctor" letters, "Dear Pharmacist" letters, and brochures, as well as "presentations" sponsored by

your firm at local pharmacy association meetings. Promotional presentations in the form of press kits, media appearances, seminar presentations or publications sponsored solely by a firm are subject to Agency jurisdiction as labeling under Section 201(m) of the Federal Food, Drug and Cosmetic Act (the Act), or as advertisements under Section 502(n) of the Act.

Therefore, we have concluded that your firm has disseminated false and misleading labeling, which causes THEO-DUR to be misbranded under Sections 502(a) and 201(n) of the Act. Section 502(a) provides that "[a] drug . . . shall be deemed to be misbranded if its labeling is false or misleading in any particular." Section 201(n) provides that "If an article is alleged to be misbranded because the labeling or advertising is misleading, then in determining whether the labeling or advertising is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations or material in the light of which representations or material with respect to consequences which may result from the use of the article to which the labeling or advertising relates under the conditions of use prescribed in the labeling or advertising thereof or under such conditions of use as are customary or usual."

We have also concluded that your firm has disseminated advertisements which cause THEO-DUR to be misbranded under Section 502(n) of the Act due to the absence in such advertisements of a brief summary of side effects, contraindications, and effectiveness meeting the requirements of FDA regulations, 21 CFR 202.1(e).

Appendix D

Review of Promotional Claims

1. Your firm sponsored numerous promotional presentations for THEO-DUR by a California physician to various pharmacy associations. These presentations were attended by members of your sales force. The physician's comments contain numerous falsehoods, as well as a broad range of misrepresentations and innuendo regarding competing products, Agency approval under Section 505(j) of the Act, and the comparative safety and efficacy of "generic" vs. "pioneer" products. Among these statements are the following:

   a. In approving long-acting theophylline preparations as bioequivalent, FDA "requires only that the active ingredient be the same."

   b. Treatment failures have been documented that were directly attributable to substitution from THEO-DUR to other AB-rated theophylline products.

   Your firm is well aware of the false and misleading nature of such presentations, and we consider your firm's participation in dissemination of such comments to constitute a clear violation of the Act. Although the physician enjoys the right of free speech, your firm is prohibited by law from sponsoring promotional presentations that are false, misleading, or lacking in fair balance.

   In our February, 1987 letter to your firm, we requested that you stop your sales force's use of a video tape containing the same type of falsehoods, misrepresentations, and innuendo. As you know, we consider requests for immediate cessation of any promotional activity to be indicative of grave concerns on our part, and we are especially concerned by your firm's subsequent dissemination of similar claims by means of an "expert" in this manner.

Appendix D

The Agency has even greater concern when the person speaking at media appearances or seminars delivers a false and/or misleading message on an ongoing basis under the firm's continuing sponsorship, with the firm thereby being aware of the nature of the presentation. A press announcement or sponsorship of a media appearance, seminar, or sole-sponsored publication should not be viewed as an opportunity to engage in promotional activities that would be considered false or misleading under the Federal Food, Drug And Cosmetic Act if conducted by your sales force or other persons employed by your firm.

Your firm may sponsor educational activities that provide for mention of your products, involve discussions of extra-labeled uses, and present data favorable to your products relative to competing products. We have, in practice, not required dissemination of full prescribing information as part of this legitimate exchange of scientific information where the information is presented in a manner that is rigorously truthful, non-promotional, objective, and balanced. If a body of data includes significant evidence favoring competing products, a balanced and objective discussion of that data in an educational context will necessarily require discussion of those advantages of competing products as an integral component of a balanced presentation. This general standard applies to the overall presentation, including content and emphasis, as related both to your firm's products and competing products.

A firm's responsibility to assure fair balance in promotional activities is mandated by the Act and universally accepted. However, educational activities are routinely prepared and presented by medical and scientific experts functioning independently from the sponsoring firm; some may see this situation as precluding any effort

by the sponsoring firm to assure objectivity and balance. Firms do, however, prospectively ensure such objectivity and balance by providing for participation of experts known to be respected and objective, by providing for peer review of their findings where appropriate, and by informing the participants and any intermediaries of the firm's and the Agency's insistence upon objectivity and balance.

2. Your firm has disseminated the following promotional claim in recent "Dear Pharmacist" letters:

   "Of all sustained release oral theophyllines, only THEO-DUR (theophylline anhydrous) Sustained Action Tablets provides zero-order absorption."

   Agency experts rejected your firm's request to describe the product's absorption as "zero-order" in the product's labeling. We consider this claim false and/or misleading.

3. Your firm has recently initiated dissemination of promotional materials based upon a study conducted by Baker, et al which compared response in patients administered different controlled-release theophylline products. Your brochures and letters based upon this study prominently present a wide range of open-ended comparative claims to the effect that substitution from THEO-DUR to other controlled-release theophylline products has been shown to entail considerable hazard to patients.

   This study was limited to THEO-DUR and controlled-release theophylline products that are "B" rated in the Food and Drug Administration's Approved Drug Products with Therapeutic Equivalence Evaluations (the Orange Book). "B" rated products are "drug products that FDA does not at this time consider to be therapeutically equivalent to other pharmaceutically equivalent products. . . ."

However, products are available that are "A" rated and considered therapeutically equivalent to THEO-DUR, and those products were not tested in this study. Therefore, your open-ended superiority claim that THEO-DUR is superior to these other "A" rated products is false and/or misleading under Section 201(n) of the Act.

We also consider the report of the Baker study to be seriously flawed, since it fails to recognize the availability of "A" rated products that can be substituted for THEO-DUR.

Conclusion

Your firm has employed falsehoods, misrepresentations, and innuendo, on a continuing basis and in the absence of any valid scientific data, in an effort to convince the medical and pharmaceutical communities that THEO-DUR is superior to all alternative controlled-release theophylline products. We have communicated such concerns in this regard to your firm previously. Therefore, we request that your firm do the following:

1. Immediately cease promotion of THEO-DUR as discussed above, and any and all other promotional activities by persons acting by or on behalf of your firm involving similar or otherwise false or misleading claims for THEO-DUR.

2. Immediately cease all distribution of the report of the study conducted by Baker, et al. Any promotional mention of that study should include a prominent statement (not a footnote) to the effect that "This study did not provide for administration of any of the available controlled-release theophylline products demonstrated to be therapeutically equivalent to THEO-DUR."

Appendix D

3. Provide a formal statement to FDA regarding the above actions.

Please respond within ten (10) working days of receipt of this letter with regard to steps taken as requested above. Depending upon your response, the Food and Drug Administration is prepared to initiate legal action to enforce the law which provides for, among other things, seizure of products found to be misbranded, injunctive relief to prevent future violations, and criminal prosecution.

Sincerely yours,

/s/
Kenneth R. Feather
Acting Director
Division of Drug Advertising
and Labeling
Office of Drug Standards

cc: Alexander R. Giaquinto, Ph.D.
Vice President, Regulatory Affairs
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Kenilworth, NJ 07033

Supreme Court, U.S.
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No. 02-342

IN THE
Supreme Court of the United States

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION,
Petitioners,
v.
FREDERICK D. EDWARDS, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 02-342

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION,
Petitioners,

v.

FREDERICK D. EDWARDS, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

PRODUCT LIABILITY ADVISORY COUNCIL, INC.'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is

[1] Petitioners' and Respondent's letters of consent to the filing of this brief *amicus curiae* by the Product Liability Advisory Council, Inc., have been lodged with the Clerk of the Court. No counsel for either party has authored this brief in whole or in part, and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

a non-profit association with 126 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

This case is of interest to *amicus* because it provides a sound vehicle for this Court to address the due process problems created by the imposition of multiple punitive damages awards. The members of *amicus* are active in the business and manufacturing communities and their members are the primary victims of excessive and repetitive punitive damages awards. Ultimately, the impact of runaway punitive damages awards is felt by the consumer who purchases goods and services. *Amicus* has a unique understanding of the impact of multiple punitive damage awards, as well as the due process implications of inflicting multiple punitive damage awards against a single defendant for the same conduct.

STATEMENT OF THE CASE

PLAC adopts and incorporates Petitioners' statement of the case.

SUMMARY OF ARGUMENT

This case crystallizes the thirty-year debate about the constitutional due process issue presented by double punishment in civil actions. Distinguished judges and scholars have grappled with the constitutional implications of multiple punitive damages awards since such awards became common in tort actions in the late 1960s and early 1970s. They have recognized that the very core of due process prevents double punishment for the same wrongdoing. Multiple awards also raise Eighth Amendment concerns in situations like this one where a portion of punitive damage awards are to be paid to the state.[2]

While state and lower federal courts have acknowledged the constitutional due process issue, these individual courts are powerless to create and enforce the nationwide resolution that this problem requires. They have made do with a hodgepodge of stop-gap approaches, while calling for direction at a national level.

This case provides a unique opportunity for this Court to address an issue that only it can resolve – due process violations created by the multiple imposition of punitive damages for the same conduct. No state court or state legislature has the power address this subject. It is not one on which Congress is likely to take action. The Court also has the opportunity to address the application of the Excessive Fines Clause in civil cases where the state is to share in the punitive award. For these reasons, the Petition for Writ of Certiorari should be granted.

---

[2] At the time of the case, the State of Oregon was entitled to fifty percent of a punitive damage award according to statute. The statute has since been amended to increase the amount of a punitive damage award that a successful plaintiff must share with the state to sixty percent of the award. *See* Or. Rev. Stat. § 18.540(1)(b) (2001).

ARGUMENT

I. INTRODUCTION

This case puts squarely before this Court the constitutionality of multiple punitive damage awards against a single defendant for the same course of conduct. In the instant case, an Oregon jury awarded two separate parties punitive damages against Key Pharmaceuticals based on the exact same evidence of the defendant's alleged nationwide course of conduct presented during a single trial. The same alleged wrongful in- and out-of-state conduct was used as a predicate for two separate punitive damage awards, as well as to augment each individual award. Unlike a situation involving multiple trials against a common defendant, there is no issue as to the identity of the conduct to be deterred or punished.[3]

In this case, the jury both awarded punitive damages to a patient who alleged he was injured because of the defendant's conduct, and to the patient's physician, Dr. Edwards, who claimed that the defendant's conduct had damaged his professional reputation because of the plaintiff's injury. It is remarkable that the jury was permitted to award Dr. Edwards punitive damages. His conduct helped bring about plaintiff's injury. He failed to read a series of warnings about the de-

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[3] This Court agreed in *State Farm Mutual Automobile Insurance Company v. Campbell*, to consider whether the Due Process Clause permits a punitive damages award to be premised on out-of-state conduct of a defendant that has no bearing on plaintiff's injury. No. 981564, 2001 WL 1246676 (Utah Oct. 19, 2001), *cert. granted*, 122 S. Ct. 2326 (2002) (No. 01-1289). While the instant case involves punitive awards based on nationwide conduct, it more importantly presents a unique and important opportunity for this Court to address constitutional due process issues raised by multiple punitive awards. As important as the issue of extraterritorial punishment is, *Campbell* does not involve an issue for which individual state and lower federal courts have cried out for direction for three decades.

fendant's Theophylline product, Theo-Dur™ -- including a specific warning that the drug's interaction with a second drug, Ciprofloxacin, could cause the toxicity problem alleged by the patient. It is even more astonishing and unconstitutional that Supreme Court of Oregon permitted an award for punitive damages to both the injured patient and Dr. Edwards. This is why.

II. MULTIPLE IMPOSITION OF PUNITIVE DAMAGES FOR THE SAME CONDUCT VIOLATES THE CONSTITUTION.

As Petitioners' brief makes clear, the jury in this case was permitted to make two awards of punitive damages, one of $35 million and another of $22.5 million, for the defendant's alleged wrongful conduct in the marketing of its pharmaceutical product Theo-Dur.™ The core of the constitutional violations is that the jury considered precisely the same wrongful conduct of the defendant in each case, yet was permitted to make two separate, very large awards punishing the defendant for that conduct.[4]

A. Double Punishment for the Same Conduct is Fundamentally Unfair.

As long ago as 1967, the distinguished Judge Henry Friendly appreciated the fundamental unfairness of punishing a defendant again and again for the same harm. He said:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs

---

[4] Dr. Edwards' counsel may contend that the defendant did not endure double punishment because it settled the case with the injured plaintiff. This is an empty assertion. The amount of the settlement was inflated by the jury's very large punitive damage award of $35 million to the plaintiff. Imposing a second punitive damage award of $22.5 million for that same conduct is a double punishment, regardless of the identity of the person to whom it was to be paid.

> are staggering . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (addressing availability of multiple punitive damages awards in products liability cases). As Judge Friendly recognized, the punitive damages remedy historically was limited to intentional torts (such as assault and battery) in cases involving a single victim, so that "a punitive recovery by him ends the matter, except for such additional liability as may be provided for by the criminal law." *Id.* at 838. Even when punitive damages practice was extended beyond intentional torts to cases where a defendant acted in conscious disregard to the interests of others, the number of plaintiffs were still few and therefore punitive damages were unlikely to result in "over-severe admonition" of the defendant. *Id.* at 838-39 & n.7.

Multiple punitive damages awards present significant problems for plaintiffs and defendants. As Judge Friendly and other jurists have appreciated, the unfairness and devastating impact of multiple punishment is not only felt by defendants, it also can jeopardize the rights of future plaintiffs. *See Roginsky*, 378 F.2d at 839-42. For instance, multiple "windfall" recoveries of punitive damages deplete a defendant's limited resources. Such damage awards may eventually drive a defendant out of business, no matter how large or how wealthy the defendant. *See generally Froud v. Celotex Corp.*, 437 N.E.2d 910, 914 (Ill. 1982) (Sullivan, J., concurring) ("[I]t cannot be denied that the spectre of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality.").

Repetitive awards ultimately endanger the ability of future claimants to recover even basic compensatory damages.

This problem is particularly visible in the asbestos context where at least 56 companies have declared bankruptcy, in part due to multiple punitive damage awards and the inflation of settlements caused by such claims. *See generally* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 339, 352-57 (2002). Over 200,000 asbestos cases are pending nationwide and 700,000 more cases are expected to be filed by 2050. *See id.* at 337. Fortunately, some courts have severed, deferred, or stayed indefinitely repetitive punitive damage claims in asbestos cases to protect the ability of current and future claimants to receive compensatory awards. *See, e.g.*, *Abate v. A.C. & S., Inc.*, No. 8923704, slip op. at 26 (Md. Cir. Ct. Dec. 9, 1992) (staying all punitive damage awards in Baltimore City asbestos cases); *Keene Corp. v. Levin*, 623 A.2d 662, 663 (Md. App. 1993) (noting a trial court judge's deferral punitive damage payments "until all Baltimore City plaintiffs' compensatory damages are paid.").

As one federal court of appeals warned, "If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims and it corporate existence." *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990); *see also Bishop v. General Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive [damage] liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs.").

Corporate bankruptcies have a devastating "ripple" effect that can extend far beyond the defendant company to injured persons who are thereafter unable to recover compensation for their injuries. Company employees may lose their jobs. Other businesses that rely on the company or its employees may lose income. Economic harm to the company also af-

fects shareholders, such as pension funds and ordinary citizens, and other investors who face the loss of their savings. As the Fifth Circuit recognized, "Neither the company's innocent shareholders, employees and creditors, not future . . . claimants will benefit from this death by attrition." *Edwards*, 911 F.2d at 1155.

Multiple imposition of punitive damages also poses a significant obstacle to global settlement negotiations in repetitive litigation and blocks the ability of claimants to recover quickly for their injuries or the loss of loved ones. As one federal district judge wrote: "Barring successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs." *See* William Schwartzer, *Punishment Ad Absurdum*, 11 Cal. Law. 116 (Oct. 1991).

The potential for multiple punitive damage awards can also have a chilling effect on job-creators and the general public, who are denied socially beneficial products. *See generally* Bruce N. Kuhlik & Richard F. Kingham, *The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability*, 45 Food Drug Cosm. L. J. 693 (1990) ("There is a growing body of evidence that the threat of punitive damages deters the development and marketing of beneficial products."). For instance, this chilling effect is illustrated by the litigation involving the drug Bendectin, a unique and effective anti-nausea morning sickness drug once marketed by Merrell Dow Pharmaceuticals, Inc. Although the drug had been and still is approved by the Food and Drug Administration and is widely acclaimed by health care professionals worldwide, Merrell Dow withdrew Bendectin from the market in 1983, in part from concerns about punitive damages liability. *See*

id. at 693.[5] As this case demonstrates, the sheer unpredictability of the current system results in over-deterrence.

Finally, multiple punitive damage awards undermine the integrity of the justice system by transforming it into a lottery where a few people collect arbitrary "wins" at the expense of everyone else – the company, its employees, its shareholders, and ordinary consumers. With the exception of those lawyers who reap windfalls from repetitive punitive damages, nobody can seriously argue that repeatedly punishing anyone for a single act makes sense or benefits society.

At some point, punitive damages no longer serve to punish and deter, but instead become grossly excessive in violation of the Fourteenth Amendment. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996). The due process unfairness of imposing multiple punitive damages cannot be allowed when the defendant has already been punished. In a series of sequential cases, such an admission would jeopardize the defendant's ability to have a fair trial. In this instance, where multiple punitive damages awards were made in the same case, the issue was virtually impossible to address with the jury.

B. Courts Raise Concerns About the Due Process Implications of Multiple Punitive Awards But Have Been Unable to Develop a Consistent or Effective Solution.

Many judges[6] and commentators[7] have voiced concern that punishing a defendant over and over again for the same

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[5] Merrell Dow has never lost a final judgment in any Bendectin case in the twenty-year history of the litigation; trial judges often dismiss these cases prior to trial. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995); *Turpin v. Merrell Dow Pharm., Inc.*, 736 F. Supp. 737 (E.D. Ky. 1990), *aff'd*, 959 F.2d 1349 (6th Cir. 1992).

[6] *See, e.g., Dunn v. Hovic*, 1 F.3d 1371, 1385 (3d Cir.) (en banc), *modified in part*, 13 F.3d 58 (3d Cir. 1993) ("The principle issue impel-

course of conduct raises "serious due process concerns."[8] As the Third Circuit recognized, "powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts should shoulder some responsibility for preventing repeated awards of punitive damages for the same act or series of acts." *In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). The Northern District of California also expressed concern that:

> overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process. Certainly the principle of res judicata, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is a part of the process that is due under our constitutional system.

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ling us to take this otherwise routine product liability case in banc is the effective of successive punitive damage awards in mass tort cases arising from the same course of conduct: We, as well as other courts, have expressed strong concerns in that regard.")

[7] *See, e.g.*, David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 Vill. L. Rev. 363, 394 (1994) (observing that the issue of multiple punitive damage awards "is a problem of enormous complexity which requires much analysis and ingenuity"); Victor E. Schwartz & Liberty Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 Adelphia L. J. 101 (1992); Dennis Jones *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 40 Ala. L. Rev. 1 (1991); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).

[8] *Dunn*, 1 F.3d at 1385; *see also King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990) (while "acutely conscious" of Judge Friendly's "prophetic words" about adverse effects of multiple punitive damages, binding Fifth Circuit precedent requires panel to set aside its "misgivings" and reject defendant's constitutional argument against multiple punitive damages awards), *cert. denied sub nom Celotex Corp. v. King*, 500 U.S. 942 (1991).

In re N. Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).[9]

One of the many courts that have wrestled with the problem expressly held that "subjecting defendants to the possibility of multiple awards of punitive damages for the single course of conduct . . . would deprive defendants of the fundamental fairness required by the Due Process Clause." *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064, *vacated*, 718 F. Supp. 1233 (D.N.J. 1989) (abiding by previous ruling that repetitive awards of punitive damages for the same conduct violate due process), *rev'd on other grounds sub nom Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 498 U.S. 898 (1990). That district court astutely acknowledged that although an award in an individual case may be fair and reasonable, the aggregate amount of repeated awards may be constitutionally excessive. *Id.* at 1055. Simply stated, redundant awards of punitive damages "cannot be tolerated under requirements of due process if it amounts to unrestricted punishment." *Id.* at 1064.[10]

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[9] *See also In re "Agent Orange" Prod. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("[W]hen a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times a defendant may be punished for a single transaction."), *aff'd* 818 F.2d 145 (2d Cir. 1987), *cert. denied sub nom Pinkey v. Dow Chem. Co.*, 484 U.S. 1004 (1988).

[10] While this Court has ruled that the Excessive Fines Clause of the Eighth Amendment does not apply in purely private actions seeking punitive damages, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989) (no Excessive Fines violation where government does not participate in punishment), excessiveness concerns are critical to the analysis of the constitutionality of punitive damages awards under the Due Process Clause. *See, e.g., BMW of N. Am. v. Gore*, 517

Many lower courts express strong concern about the constitutionality of multiple punitive damage awards, but have taken a variety of conflicting approaches in attempting to craft a solution. Some courts have attempted to craft innovative solutions but have fallen short of their goal; others have adopted short-term solutions to resolve the case immediately before them; still other courts have abdicated responsibility altogether because no one state or lower federal court can solve the problem.

One lower federal court sought to resolve the constitutional due process problem by allowing only one punitive award based on a single course of conduct in mass tort litigation. *See Juzwin*, 705 F. Supp. at 1065 (where defendants can establish that punitive damages already have been assessed for conduct at issue in the action, "the court will dismiss plaintiff's claim for such punitive damages"). This ruling was overturned on other grounds, *see* 900 F.2d 686, and other courts have declined to endorse this approach. *See, e.g.*, *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 283-84 (D.N.J. 1989) (*Juzwin* solution is "arbitrary," "harsh and inequitable" and creates a race to the courthouse door).

U.S. 559 (1996); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *TXO Prod. Co. v. Alliance Res. Corp.*, 509 U.S. 443 (1993). Similarly, while this Court has seemingly indicated that the Double Jeopardy Clause may not apply to private suits seeking punitive damages, *Hudson v. United States*, 522 U.S. 93 (1997), double jeopardy concerns are echoed in the Due Process Clause and its guarantee of fundamental fairness. *See* Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 Vill. L. Rev. 415, 423-31 (1994) (suggesting that "the core of the prohibition against double jeopardy is probably included in the Due Process guarantee," and arguing its applicability to multiple punitive damages that take into account total harm); 2 Am. Law Inst., *Reporters' Study, Enterprise Responsibility for Personal Injury* 260 (1991) (concluding that repeatedly penalizing corporate defendants for a single wrongful judgment or action is "antithetical to the protection against double jeopardy that characterizes overtly penal regimes").

Other courts have attempted to solve the problem by certifying the punitive damages issue for class action resolution. In product liability litigation over the Dalkon Shield, for example, the federal district court sought to address the problem by certifying a nationwide class action on the issue of punitive damages. *See In re Dalkon Shield,* 526 F. Supp. at 893. The court explained that to balance multiple plaintiffs' rights to obtain punitive awards with the defendant's due process rights "the class action is the best available device to protect the interests of all parties." *Id.* at 900. As noted by the Ninth Circuit on appeal, though, commonality and predominance issues undermine this approach. *See* 693 F.2d at 850. The Ninth Circuit rejected the nationwide class certification for a variety of reasons – including the conflicting state laws governing punitive damages. *See id.* at 850-52 (stating that "a class action ... is not the only way to protect a defendant from unreasonable punitive damages," but failing to offer any suggestions on how that could be done); *see also In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1982) (reversing certification of punitive damages class for lack of commonality factors and violation of the Anti-Injunction Act).

Some courts have suggested that defendants introduce evidence at trial that they have been impacted by prior punitive damage awards. *See, e.g., Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) (recognizing the potential for "serious constitutional concerns" in the multiple imposition of punitive damages for the same conduct but declining to address the issue because the defendant "neither adequately raised this legal argument nor made sufficient record on it in the trial court"). But defendants who are focused on liability in a particular case should not be expected to introduce evidence of prior punitive damage awards resulting from the same conduct. Such information would be highly prejudicial. *See* David G. Owen, *Problems in Assessing Punitive*

Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 52-53 (1982) (noting that "for obvious tactical reasons," a defendant "fairly might wish to avoid presenting" such information to the jury during the liability phase of a trial).

Moreover, some courts have suggested that multiple punitive damage awards cannot pose a due process issue unless the defendant is on the verge of collapse. *See, e.g.*, *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1243-44 (Kan. 1987) (finding in Dalkon Shield litigation that there was insufficient information before the court to determine whether multiple punitive damage awards would lead the defendant to insolvency); *Leonen*, 717 F. Supp. at 286 (finding that "the 'overkill argument is not entirely without merit," but "[t]here is nothing before the court which indicates that any of the defendants . . . are facing bankruptcy"). While being forced into bankruptcy by repetitive punitive awards for the same misconduct certainly would signal a violation of due process, surely such constitutional protections are triggered at some earlier point, before the defendant business is wiped out. *See* Victor E. Schwartz & Liberty Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 Adelphia L. J. 1, 73 (1992) ("It is incongruous to suggest that awards of punitive damages for the same conduct need not be reined in until the defendant is teetering on the brink of extinction.").

Individual courts have thrown up their arms and declared that they are powerless to resolve a problem which requires a national solution. They have asked this Court for guidance. *See, e.g.*, *Dunn*, 1 F.3d at 1389 (raising concerns about potential for due process violations from multiple punitive damages awards in asbestos cases, but declining to be so "intrepid" as to "iterate a blanket policy judgment . . . in light of the Supreme Court's studied silence on the policy issue"); *Jackson v. Johns-Manville Corp.*, 781 F.2d 394, 417 (5th

Cir.) (Clark, J., dissenting) (arguing that multiple punitive damages issue was matter of national public policy and should have been certified to the United States Supreme Court "because matters of national public policy have nationwide application"), *cert. denied,* 478 U.S. 1022 (1986). As the Supreme Court of Texas declared, "It may be that a truly uniform solution can only be fashioned by either the [United States] Supreme Court or Congress." *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1996). Likewise, the Iowa Supreme Court has stated,

> We do not disagree that the problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one . . . . We believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damages awards in mass tort litigation.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865-66 (Iowa 1994). The New Jersey Supreme Court also expressed its frustration when it commented that "[a]t the state court level, we are powerless to implement solutions to the nationwide problems created by [multiple punitive damage awards.]" *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986).

III. CERTIORARI IS ALSO APPROPRIATE TO DETERMINE WHETHER THE DOUBLE PUNISHMENT IN THIS CASE VIOLATES THE EXCESSIVE FINES CLAUSE.

Not only may double punishment violate the defendant's due process rights, the state's recovery of half of the punitive award is additional cause for concern. Punitive damages are not ordinary civil or tort law damages.[11] Unlike compensa-

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[11] *See* Victor E. Schwartz *et al.*, Prosser, Wade and Schwartz's Cases and Materials On Torts, 549-50 (10th ed. 2000).

tory damages, which provide payment for economic losses (e.g., lost wages and medical expenses) and noneconomic injuries (e.g., "pain and suffering"), punitive damages are not awarded to compensate for a harm. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury . . . [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence").[12] Rather, punitive damages are "quasi-criminal" in nature and "operate as 'private fines' intended to punish the defendant and deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)).

Given the quasi-criminal nature of punitive damage awards, repeated punishment for the same course of conduct may not only violate due process, but also may run afoul of Eighth Amendment's prohibition of excessive fines. As the relevant portion of the Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, not cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In *Browning-Ferris*, 492 U.S. at 262, 266, the Court ruled that the Excessive Fines Clause "appl[ied] primarily, and perhaps exclusively, to criminal prosecutions and punishments" and its "primary focus" was not concerned with civil damages. However, the Court also qualified its ruling, noting that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action *nor has any right to receive a share of the damages awarded.*" *Id.* at 264 (emphasis added).

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[12] *See also* W. Page Keeton *et al.*, Prosser and Keeton on the Law of Torts, § 2, at 9 (5th ed. 1984) (explaining that punitive damages are awarded to punish defendant, teach defendant not to "do it again," and deter others from similar behavior).

More recently, in *Cooper Industries,* the Court recognized that although states have broad discretion in imposing criminal penalties and punitive damages, "the Due Process Clause of the Fourteenth Amendment . . . imposes substantive limits on that discretion." 532 U.S. at 433. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the states. 532 U.S. at 434-35 (citing *Furman v. Ga.*, 408 U.S. 238 (1972) (per curiam)). In the present case, the state's collection of a share in the multiple punitive damage awards imposed against the same defendant for identical conduct may result in an unconstitutionally excessive fine, irrespective of the awards' excessiveness under the *Gore* factors.[13]

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[13] *See McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990) (ruling that the Georgia statute allocating 75% of punitive damage awards to the state's general fund was unconstitutional because it "converts the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State, contrary to the constitutional prohibitions as to excessive fines and contrary to the double jeopardy clause of the Fifth Amendment to the Constitution of the United States").

CONCLUSION

For the foregoing reasons, *amicus curiae* Product Liability Advisory Council, Inc. requests that this Court grant the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

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APPENDIX A

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
CORPORATE MEMBERS

3M

Allegiance Healthcare Corporation

Altec Industries

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Ansell Healthcare, Inc.

Appleton Papers, Inc.

Aventis Pharmaceuticals Inc.

BASF Corporation

Baxter International, Inc.

Bayer Corporation

Beretta U.S.A Corp.

BIC Corporation

Biro Manufacturing Company Inc.

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Bombardier Recreational Products

BP Amoco Corporation

Bridgestone/Firestone, Inc.

Briggs & Stratton Corporation

Bristol-Myers Squibb Company

Brown and Williamson Tobacco

Brown-Forman Corporation

Brunswick Corporation

Caterpillar Inc.

Centerpulse USA Inc.

Chevron Corporation

Compaq

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

DaimlerChrysler Corporation

Dana Corporation

Deere & Company

Delphi Corporation

Dorel Juvenile Group, Inc.

E & J Gallo Winery

E. I. DuPont de Nemours and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

ExxonMobil Corporation

FMC Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

Georgia-Pacific Corporation

GlaxoSmithKline

GLOCK, Inc.

Great Dane Limited Partnership

Guidant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Honda North America, Inc.

Hyundai Motor America

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc.

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Mazda (North America), Inc.

McNeilus Truck and Manufacturing, Inc.

Medtronic, Inc.

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motor Sales of America, Inc.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Otis Elevator Company

PACCAR Inc

Panasonic

Pentair, Inc.

Pfizer Inc.

Pharmacia Corporation

Philip Morris Companies Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Raytheon Aircraft Company

Remington Arms Company, Inc.

Rheem Manufacturing

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Sofamor Danek, Medtronic Inc.

Solutia Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

Sunbeam Corporation

Synthes (U.S.A.)

Textron, Inc.

The Boeing Company

The Dow Chemical Company

The Goodyear Tire & Rubber Company

The Heil Company

The Lincoln Electric Company

The Procter & Gamble Company

The Raymond Corporation

The Sherwin-Williams Company

The Toro Company

Thomas Built Buses, Inc.

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Water Bonnet Manufacturing, Inc.

Whirlpool Corporation

Wilbur-Ellis Company

Wyeth

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION,
Petitioners,

v.

FREDERICK D. EDWARDS, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

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IN THE

Supreme Court of the United States

No. 02-342

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION,
Petitioners,

v.

FREDERICK D. EDWARDS, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE* [1]

The American Insurance Association ("AIA") is the leading property and casualty insurance trade organization in the United States. It represents some 410 insurers that write in excess of $87 billion in premiums nationwide. AIA member companies write every type of property and casualty

[1] Counsel of record for both Petitioners and Respondent have consented to the filing of this brief in letters that have been lodged with the clerk. No counsel representing a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members made a monetary contribution to the preparation or submission of this brief. An affiliate of a member of *amicus curiae* is an insurer of Petitioners.

insurance, including products liability insurance covering the type of liability for which punitive damages were awarded in this case.

AIA has a significant interest in this Court's resolution of the appellate standard of review issue raised by the decision below. The Oregon courts do not apply a *de novo* standard of review to a jury's award of punitive damages. Instead, the Oregon courts apply a deferential standard whereby a jury's punitive award is upheld if, construing the evidence in favor of the verdict, a "rational juror" could award such damages. This approach significantly erodes the meaningful and searching review mandated by this Court's due process jurisprudence. *See Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

AIA members have a strong interest in ensuring meaningful judicial review, which this Court has identified as the primary check on runaway verdicts. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). Liability insurers ultimately bear a significant portion of the costs of punitive damages awarded by juries. AIA, therefore, submits this brief in support of Petitioners.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted to correct Oregon's repeated failure to observe the Court's due process standards in this frequently litigated area of the law. In *Oberg*, 512 U.S. at 421, the Court declared unconstitutional Oregon's "'system of trial by jury in which the judge is reduced to the status of a mere monitor.'" *Id.* (citation omitted). Following *Oberg*, the Court has made clear the constitutional mandate for meaningful judicial scrutiny of punitive damage awards. *See Cooper Indus.*, 532 U.S. 424; *BMW of N. Am. v. Gore*, 517 U.S. 559.

But the Court's message has not been heard. After *Oberg*, Oregon has continued to adhere to a standard of review that effectively makes the jury the final arbiter of the amount of punitive damages for federal constitutional purposes. In Oregon, every reviewing court—both trial and appellate—applies a "rational juror" standard that is not appreciably different from abuse of discretion review, in terms of both substance and practical effect. Under this approach, the jury's punitive award is upheld if, construing the evidence in favor of the verdict, a rational juror on the trial record could award such damages. (App. 154-55). This approach does not satisfy the constitutional standards laid down in *Cooper Industries*, *BMW*, and *Oberg*. Those cases require a searching judicial review, not a stunted and superficial review.

Oregon's departure from the requirements of this Court's precedents puts it in conflict with other courts. Several state and federal courts have held that the *BMW* inquiry calls for plenary review and therefore no deference is owed to the jury's findings.[2]

The Oregon court's ruling also deepens disagreement among the courts on a related issue. Oregon and a minority of courts intermingle the *BMW* guideposts with state law factors, such as the defendant's wealth, that have little or nothing to do with the constitutional issue of fair notice.[3]

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[2] *See, e.g., In re Exxon Valdez*, 270 F.3d 1215, 1239 (9th Cir. 2001); *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 82 (1st Cir. 2001); *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 668 (N.M. 2002); *Horton Homes, Inc. v. Brooks*, No. 1000346, 2001 WL 1520623, at *10 (Ala. Nov. 30, 2001), *cert. denied*, 122 S. Ct. 1911 (2002). *But see Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1349 (Fed. Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3117 (U.S. July 24, 2002) (No. 02-130); *Ibaenez v. Velasco*, No. 96 C 5990, 2002 WL 731778, at *13 (N.D. Ill. Apr. 25, 2002).

[3] *See, e.g., Nat'l Ins. Ass'n v. Sockwell*, No. 1001627, 2002 WL 399041, at **22-27 (Ala. Mar. 15, 2002); *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 484 (Or. 2001).

This reflects confusion of the federal constitutional issue with state law issues. By contrast, the majority of courts assess the *BMW* factors separately from the state law factors.[4]

The question of the proper standard of review is one of significant, recurring importance. In almost all cases in which punitive damages are awarded, the trial court will be asked to evaluate the award under the federal constitutional standards. The trial court inevitably will face the question of what deference should be given to the jury's award. Despite evidence of conflicting approaches in the courts, the constitutional origins of the *BMW* standard require a uniform federal standard for review regardless of the state where the claim arose. Further, the conflict is now firmly entrenched and incapable of resolution except by this Court. The Oregon courts, for example, repeatedly have held that the rational juror standard does not violate *BMW* or *Cooper Industries*.[5] Immediate review is urgently needed to restore certainty to this area of the law and to require observance of this Court's due process requirements.

I. OREGON'S RATIONAL JUROR STANDARD CONFLICTS WITH *COOPER INDUSTRIES* AND *BMW*

This case is one in a series of punitive damages cases in which the Oregon courts have confused and conflated the state and constitutional standards for judging the exces-

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[4] *See, e.g., Wightman v. Consol. Railcorp.*, 715 N.E.2d 546, 552-54 (Ohio 1999), *cert. denied*, 529 U.S. 1012 (2000); *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139, 162-66, 99 Cal. App. 4th 1115, 1146-52 (Cal. Ct. App. 2002); *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 382-88 (La. Ct. App. 2001).

[5] *See Parrott v. Carr Chevrolet*, 17 P.3d at 481-85; *Williams v. Philip Morris Inc.*, 48 P.3d 824, 836-37 (Or. Ct. App. 2002); *Bocci v. Key Pharmaceuticals, Inc.*, 35 P.3d 1106, 1109-11 (Or. Ct. App. 2001), *review denied*, 47 P.3d 486 (Or. 2002).

siveness of a punitive damages award. In Oregon, the courts decide the ultimate constitutional question of excessiveness under a "rational juror" standard of review. This standard has allowed the Oregon courts to pay lip service to this Court's due process jurisprudence while, in reality, maintaining the system of superficial or nonexistent judicial review struck down in *Oberg*.

A. The Development of Oregon's Rational Juror Standard

From 1910 to 1994, Oregon was the only state in the nation where the courts could not correct excessive verdicts for punitive damages. *Oberg*, 512 U.S. at 426-28. The Oregon constitution required a procedure that amounted to a "'system of trial by jury in which the judge is reduced to the status of a mere monitor.'" *Id.* at 421. (citation omitted). In 1994, this Court declared Oregon's procedures unconstitutional because they provided "no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Id.* at 429. The Court remanded the case without deciding what standard of review was constitutionally required.

On remand, the Oregon Supreme Court adopted a "rational juror" standard:

> A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.

Oberg v. Honda Motor Co., 888 P.2d 8, 10 (1995), *cert. denied*, 517 U.S. 1219 (1996).

But with the explosive growth in excessive punitive damages verdicts, this Court subsequently laid down the substan-

tive law for trial courts to apply in judging the excessiveness of a punitive award. *BMW*, 517 U.S. at 575-85. The *BMW* analysis calls for measuring the punitive award (1) on a scale of reprehensibility, (2) in relationship to the seriousness of the actual or threatened injury, and (3) through the prism of comparable legal and legislative sanctions. *Id.* Each of these measurements looks for guidance to outside criteria of general applicability that not only are legal in nature, but were not on trial in the courtroom. *See id.* In *Cooper Industries*, the Court subsequently held that appellate courts must review *de novo* the trial court's *BMW* analysis, rather than applying an abuse of discretion standard. 532 U.S. at 443.

Despite those clear rules, the Oregon Supreme Court adopted a reading of *BMW* under which it asserted that the state "rational juror" standard survived. *Parrott*, 17 P.3d at 480-85. The court held that, "*Gore* has not 'superseded' the rational juror standard that this court articulated in *Oberg*." *Id.* at 484. The Oregon Supreme Court justified this reading in part on its obligation "to give effect, to the greatest extent possible," state law requirements potentially conflicting with federal constitutional law. *Id.* at 485. The state constitution made calculating punitive damages a function of the jury. *Id.* at 484. In the Oregon court's view, the rational juror standard best balanced the competing mandates of the state and federal constitutions. *Id.* at 484-85.

The Oregon Supreme Court further held that the *BMW* factors would be considered part and parcel of the state law excessiveness analysis. *See, e.g.*, *Parrott*, 17 P.3d at 484 ("[W]e conclude that the guideposts announced in *Gore* are additional factors for the reviewing court in Oregon to consider as part of the . . . rational juror review."). In other words, when a federal due process challenge is raised, the Oregon courts review the jury's award by combining the *BMW* guideposts with the statutory factors considered when

reviewing punitive damage awards under state law. There is no separate or independent analysis of the *BMW* factors. *See, e.g. Parrott,* 17 P.3d at 483-484 (in finding the "range that a rational juror would be entitled to award," the court "combin[es] the factors announced by the Supreme Court in *Gore* with those announced by this court in *Oberg* (state)"); *see also Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 476 (Or. 1999) (disposing of due process argument and state law excessiveness argument in a single paragraph, citing only Oregon law).

B. The Rational Juror Standard Essentially Repudiates *BMW* and *Cooper Industries*

Oregon's "rational juror" standard conflicts with *BMW* and *Cooper Industries* in two respects.

First, Oregon has diluted the *BMW* substantive standard by combining it with the state test for excessive punitive damage awards. These tests are analytically distinct, pursue different ultimate determinations and hence require two separate inquiries. State law factors having little or nothing to do with fair notice should not be fused with *BMW*'s guideposts. This Court made clear that the three measures described in *BMW* are designed to help a reviewing court determine the maximum amount of punitive damages a state can impose without denying a defendant's right to due process.[6] In contrast, state law tests for excessiveness are generally aimed at determining whether a punitive damage award is the result of passion and prejudice. Put simply, *BMW* asks whether a defendant had fair notice, while state law typically asks whether a reasonable jury could have imposed the amount in question.

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[6] *See Johansen v. Combustion Eng'g, Inc.*, 170 F. 3d 1320, 1334 (11th Cir.) ("*BMW* makes clear that there is a constitutional limit on a punitive damage award beyond which neither the jury nor the court has any discretion to venture."), *cert. denied*, 528 U.S. 931 (1999).

Additionally, some state law factors are actually inconsistent with due process considerations. For example, when intermingling state law factors with *BMW*'s standards, the Oregon courts have cited the defendant's ability to pay as a basis for upholding a punitive damage award. *See, e.g.*, *Philip Morris*, 48 P.3d at 840-41. Although Oregon law provides that the defendant's wealth has a place in assessing the amount of punitive damages in the first instance, and in reviewing a punitive award for excessiveness, see Or. Rev. stat. § 30.925(2)(f), this Court made clear in *BMW* that a defendant's wealth has no bearing on whether a punitive award violates due process: "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." *BMW*, 517 U.S. at 585.

Second, and more fundamentally, Oregon's rational juror standard is not constitutionally acceptable. In fact, the Oregon standard is utterly misdirected by using an approach designed only for review of a jury's findings to review trial judge determinations made largely on the basis of factors outside the record. *BMW* requires a reviewing court to undertake a function distinctly different from confirming that a jury award is rational. The *BMW* analysis assumes that a rational jury could have rendered the award consistently with the record and proper legal instructions. Indeed, if there is any question whether the award comports with the record and instructions or otherwise complies with the applicable state law, courts should address those issues first by reducing or vacating the award under state law pursuant to basic principles of constitutional avoidance. *BMW* instead asks a court to determine whether a punitive damages award that fully complies with state law nonetheless violates the federal Constitution. In other words, *BMW* assumes that the jury did its job properly under state law.

The *BMW* inquiry is a comparative legal analysis that looks at factors ***outside*** the record in order to ascertain whether the defendant "receive[d] fair notice . . . of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Thus, in determining the degree of reprehensibility of the defendant's conduct, this Court did not confine itself to evidence of record but examined case law and statutes relevant to the gravity of the applicable conduct. *See id.* at 575-76. The Court created a spectrum of degrees of reprehensibility by using other cases and then evaluated the defendant's reprehensibility according to its location on this spectrum. This comparison obviously goes beyond review of the rationality of a jury finding. Similarly, the determination of the proportional relationship between compensatory and punitive damages is a legal standard for gauging the reasonableness of the damages award, *see id.* at 580-82, and not an examination of the record to find support for the jury's verdict. Finally, the comparison of the punitive damages award to legislative sanctions for comparable conduct is a legal inquiry that no jury undertakes. *Id.* at 583-84. It therefore makes no sense to apply a rational juror standard of appellate review to the ultimate constitutional question of excessiveness because the court is evaluating factors and evidence that were never before the jury and which it was the function of the trial court to assess in the first instance.

Oregon's rational juror standard derives from *Jackson v. Virginia*, 443 U.S. 307, 313 (1979), as a "sufficiency of the evidence" test for assessing a jury's findings of fact.[7] But the analogy to *Jackson* is misguided because the analysis of excessiveness under the Due Process Clause is not a review of jury findings of fact. As the Court recognized in *Cooper Industries*, "the jury's award of punitive damages does not constitute a finding of 'fact.'" *See Cooper Indus.*, 532 U.S.

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[7] *See Parrott*, 17 P.3d 483; *State v. Moore*, 927 P.2d 1073, 1096 (Or. 1996); *Oberg*, 888 P.2d at 11 & n.7.

at 437. Consequently, in examining whether the verdict for punitive damages is constitutionally acceptable, the inquiry is not an evidentiary probe of the factual record undertaken by the "rational factfinder" in *Jackson*. Rather, it is a legal analysis framed by the factors articulated in *BMW*, one major purpose of which is to look to punishment handed out elsewhere for similar or identical conduct in order to determine whether the sanctions imposed in the case at bar have a reasonable relationship to the offense committed. The distinction between the standards for jury review and review of the *BMW* factors is thus the difference between a review of the underlying facts and a review on the law—elevated in this instance to constitutional importance.[8]

Oregon's rational juror standard is in conflict with the basic rules of judicial review. While factual matters are reviewed only for clear error, courts customarily conduct plenary review of the governing legal standards.[9] Courts also conduct plenary review of so-called mixed questions of law and fact when that process is necessary to develop the meaning of a legal standard and to ensure its consistent application.[10] These are the very reasons why, as the Court recognized in *Cooper Industries*, there should be *de novo* review of punitive damages awards. *See Cooper Indus.*, 532

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[8] Oregon's ruling that a jury's award of punitive damages should be reviewed by the trial court under *Jackson*'s rational juror standard is misguided for another reason. It is typically not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found. A rule of deference to phantom findings is thus unworkable because it necessarily rests on speculation about the jury's reasons.

[9] *See, e.g., Ornelas v. United States*, 517 U.S. 690, 697, (1996).

[10] *See, e.g., Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980); *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972).

U.S. at 440 (noting that the development of the law at the appellate level gives guidance to the trial courts and promotes consistent outcomes).

The distinction between the two standards of review is not simply a technical difference but has real consequences in review for excessiveness. The Oregon courts have refused to reduce punitive damage awards in fourteen out of the fifteen cases since 1994, when this Court decided *Oberg*. (App. 118).

The decisional record thus demonstrates that Oregon has maintained the jury's role as the final arbiter of punitive damage awards. Oregon courts do not undertake a searching and independent review of the award, as mandated by *BMW* and *Cooper Industries*, but rather a severely constrained review that overturns only those jury awards so extreme as to be irrational. In effect, the role of the Oregon judge as a "mere monitor" has not changed since *Oberg*. This egregious failure to follow the established framework of this Court should be addressed immediately.

II. OREGON'S RATIONAL JUROR STANDARD CONFLICTS WITH DECISIONS OF OTHER COURTS

Oregon's departure from the requirements of this Court's due process jurisprudence puts it in conflict with other courts that faithfully apply that binding authority. Review by this Court is warranted to resolve that conflict.

Specifically, Oregon's rational juror standard creates a conflict with the First and Ninth Circuits and with the Supreme Courts of New Mexico and Alabama. All of those courts currently recognize that *Cooper Industries* requires appellate analysis of the *BMW* factors without deference

to the jury's award.[11] As the Alabama Supreme Court explained, "[i]n applying the *de novo* standard of review to [defendant's] constitutional challenge to the amount of the punitive-damages award, we must review the evidence and the law without deference to the jury's award or to the trial court's rulings." *Horton Homes*, 2001 WL 1520623, at *10.

Currently pending before the Court is a petition from the Federal Circuit that seeks review of the same conflict. In that case, the Federal Circuit deferred to the jury's finding on reprehensibility and, indeed, concluded that the *de novo* review required by *Cooper Industries* was "essentially meaningless." *Rhone-Poulenc Agro*, 272 F.3d at 1348; *accord Ibaenez v. Velasco*, No. 96 C 5990, 2002 WL 731778, at *13 (N.D. Ill. Apr. 25, 2002).[12]

In addition, the courts are divided on the question of whether the reviewing court can combine the *BMW* guideposts with the factors considered when reviewing punitive damage awards under state law. On the one hand, Oregon and a number of courts intermingle the state and federal inquiries.[13] On the other hand, many courts under-

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[11] *In re Exxon Valdez*, 270 F.3d at 1239-41; *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d at 82; *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d at 668; *Horton Homes*, at 2001 WL 1520623, at *10.

[12] *See also* Petition for a Writ of Certiorari at 14 (filed July 26, 2002), *DeKalb Genetics Corp. v. Bayer CropScience, S.A.* (No. 02-130) ("[T]he Federal Circuit's decision creates a division of authority over the extent to which a court conducting an excessiveness inquiry can defer to the jury's findings in determining that the defendant's conduct was reprehensible."). This case presents a better vehicle to resolve the conflict. The Federal Circuit's *DeKalb* decision focused only on the reprehensibility factor, while Oregon's "rational juror" standard also applies to all three *BMW* factors.

[13] *See, e.g., Parrott*, 17 P.3d at 484; *Nat'l Ins. Ass'n v. Sockwell*, 2002 WL 399041, at **22-27 (combining *BMW* guideposts with factors considered under Alabama law); *Welch v. Epstein*, 536 S.E.2d 408, 421-

take the *BMW* inquiry separate and independent of the state law standards.[14]

Legal commentators have urged the Court to provide further guidance in this important area of the law. For example, Cass R. Sunstein observed in his new book:

> *BMW* has spurred new thinking about how to limit jury discretion in awarding punitive damages. . . . Decisions of lower courts are in disarray, despite a Supreme Court decision calling for careful appellate review of constitutional challenges to punitive awards.

Cass R. Sunstein, *et al.*, *Punitive Damages: How Juries Decide* at 244 (2002).

Only this Court can end the widening confusion on this issue. Postponing review is not likely to contribute to consistent resolution of the questions presented here. The Oregon courts have already demonstrated that they will not alter their position in light of *BMW* and *Cooper Industries*.[15] Thus, Oregon's position and the resulting conflict is firmly entrenched and incapable of resolution except by this Court.

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23 (S.C. Ct. App. 2000) (combining BMW factors with state law factors); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561-64 (Ind. Ct. App. 1999) (combining *BMW* guideposts with factors considered under Indiana law), *cert. denied*, 529 U.S. 102 (2000).

[14] *See, e.g.*, *Wightman v. Consol. Rail Corp.*, 715 N.E.2d at 552-54; *Romo v. Ford Motor Co.*, 99 Cal. App. 4th at 1146-52; *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d at 382-88; *Cass v. Stephens*, No. 08-97-00582-CV, 2001 WL 28092, at **30-33 (Tex. App. – El Paso 2001); *Baker v. Nat'l State Bank*, 801 A.2d 1158, 1163-76 (N.J. Super. Ct. App. Div. 2002); *see also Burton v. R.J. Reynolds Tobacco Co.*, 205 F. Supp.2d 1253, 1259-65 (D. Kan. 2002).

[15] *See Parrott*, 17 P.3d at 481-85; *Philip Morris*, 48 P.3d at 836-37; *Bocci*, 35 P.3d at 1109-11.

III. THIS CASE MERITS REVIEW BECAUSE OF INCREASING EVIDENCE THAT MEANINGFUL APPELLATE REVIEW IS ESSENTIAL TO SAFEGUARD AGAINST ERRATIC PUNITIVE DAMAGE AWARDS

This case represents more than just one State court cast adrift. It exemplifies the severe problem that can occur when trial courts abdicate their role in supervising awards of punitive damages. There is increasing evidence that jury awards of punitive damages are arbitrary, thus increasing the importance of the *de novo* judicial review mandated by *BMW* and *Cooper Industries*.

As this Court has repeatedly recognized, meaningful and effective judicial review of a jury's punitive verdict is necessary to protect against arbitrary punishment. *Oberg*, 512 U.S. at 452. In 1994, the Court observed that "[e]mpirical evidence, in fact, supports the importance of judicial review of the size of punitive damages awards." *Id.* at 433 n.11.

New and important scientific research on punitive damages decisionmaking strongly reinforces this conclusion. In particular, recent empirical studies by leading scholars show that even conscientious and well-intentioned juries produce systematically erratic and unpredictable awards. The results of this newly published research are both striking and sobering. Among the major findings:

- While jurors show remarkable consistency in ranking the "outrageousness" of wrongful conduct on a bounded scale (e.g., a scale of one to ten), their translation of such rankings into dollar punitive awards is enormously variable and unpredictable.
- Contrary to commonly-held belief, deliberation by groups of jurors does not moderate the unpredictability of punitive awards, but exacerbates such

unpredictability, with deliberating juries returning consistently higher and more variable awards than jurors individually.

- Juries assessing punitive damages will not and cannot apply standard economic deterrence theories, even when specifically instructed on how to do so.
- Juries assessing punitive damages impose significantly varying awards in response to inappropriate factors, including the amount requested in argument by plaintiffs' counsel and bias in favor of local plaintiffs.
- Juries assessing punitive damages exhibit both hindsight bias and irrational attitudes towards risk, for example awarding higher punitive damages against defendants who conduct cost/benefit analyses than against those who do not.

Cass R. Sunstein, Punitive Damages: How Juries Work (2002).

Importantly, these findings do not imply that jurors on the whole are not conscientious, intelligent, or properly motivated. Rather, they show that in the context of punitive damage decisions, juries return erratic and unpredictable dollar awards because of natural features of human cognition. Juries assessing punitive damages as one-time decisionmakers in isolated cases have no ready frame of reference for translating a desire to punish blameworthy conduct into dollar punishment. As a consequence, different juries will assess widely divergent dollar punishment for identical conduct against identical defendants in identical cases. And such decisions are distinctively susceptible to a variety of common cognitive biases, all of which the behavioral literature has observed in other decisionmaking contexts. The inescapable conclusion of this growing body of scientific literature is that dollar awards imposed by juries in isolated punitive damage cases do not reflect—and cannot be expected to reflect—

commonly shared values or objectives about either retribution or deterrence. Rather, the studies show that dollar awards are essentially arbitrary.

These findings confirm that vindication of the core due process concerns elaborated in *BMW*—fair notice of potential punishment and evenhanded treatment of similarly situated parties—will turn as a practical matter on the extent to which reviewing courts apply the *BMW* guideposts for constitutional review of punitive damages in consistent and predictable fashion.

Because due process rights are at stake, the need for this Court to act is all the more urgent. Minimum requirements of due process are not a matter of local discretion or option. Because of *BMW*'s constitutional basis, there must be a uniform standard. As Justice Breyer put it, it is "the uniform general treatment of similarly situated persons that is the essence of law itself." *BMW*, 517 U.S. at 587 (Breyer, J., concurring, joined by O'Connor and Souter, J.J.).

Because plaintiffs "fear appellate reduction of damages," *Oberg*, 512 U.S. at 433 n.11, the Oregon court's ruling will foster forum-shopping in the large percentage of cases where multiple venues are available. *See Norfolk & W. Ry. v. Ayers*, 122 S. Ct. 1434 (2002) (granting certiorari in a case where petitioner complained about increased forum shopping in West Virginia for federal tort claims).

In short, immediate review by this Court is needed to restore certainty to this important area of the law and assure that the lower courts are applying *BMW* and *Cooper Industries* in a consistent and effective manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

Dr. Edwards' Opposition disputes neither the existence nor importance of the due process issues presented by this case. Rather, he primarily seeks to demonstrate that the alleged reprehensibility of Key's promotional conduct and its "gargantuan" size sufficiently justified the jury's duplicative and disproportionate punitive damages award. Dr. Edwards also claims that Key failed to protect its rights in the Oregon courts notwithstanding Key's undeniable assertions below that the punitive damages awarded to Dr. Edwards are unconstitutionally excessive and unconstitutionally tainted by the trial court's procedural mishandling of the *Mary Carter* issue.

The existence of evidence to justify an award of *some* punitive damages against Key is not disputed in the Petition, as it was not disputed in *Oberg*, *BMW*, or *State Farm*.[1] Rather, the Petition focuses on the standards for appellate review of the *amount* of such damages and the procedure by which they were awarded. If anything, Respondent's attempt to avoid these issues by explaining why and how the jury was persuaded to excess reinforces the constitutional infirmity of Oregon's rational juror review standard and the need for this Court to clarify and enforce its legal standards for reviewing and constraining punitive damages awards under the Fourteenth Amendment.

I. THE ADDITIONAL EVIDENCE SUMMARIZED IN THE OPPOSITION SUPPORTS ALLOWANCE OF THE WRIT.

Dr. Edwards' Opposition claims that the Petition for a Writ of *Certiorari* omits numerous "facts clearly material to consideration of the questions presented." Brief in

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[1] *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mutual Auto Insurance Co. v. Campbell*, No. 01-1289 (*cert. granted* June 3, 2002).

Opposition ("Opposition") at 3-4. Dr. Edwards presents an extended counterstatement of facts that is intended to demonstrate that Key engaged in reprehensible conduct. Opp'n at 10. However, most of the conduct Dr. Edwards describes had nothing to do with the harm suffered by Plaintiff or Dr. Edwards, and has no bearing on whether this case merits a grant of *certiorari*.

The questions presented concern whether due process permits a state to impose multiple, cumulative punitive damages awards based on nationwide conduct, whether the rational juror standard of review is constitutionally adequate, and whether the procedure by which punitive damages were imposed satisfied due process. *See* Petition for a Writ of *Certiorari* ("Petition") at *i*. The fact that Key's conduct may have been sufficiently reprehensible to justify *some* punitive award does not override the protections of the Fourteenth Amendment. Moreover, the evidence that Dr. Edwards catalogues selectively – and, in Key's view, misleadingly – reinforces the overlap between the legal issues raised in the Petition and those raised by *State Farm*.

First, there is no causal link between most of the facts Dr. Edwards recites and Plaintiff's physical injury or Dr. Edwards' emotional injury. Thus, like *State Farm*, this case raises the issue whether due process guarantees permit a punitive damages award based on conduct unrelated to the plaintiff's injury. For example, Dr. Edwards describes at length the history of Key's revisions to its package insert to include a warning concerning the interaction of Ciprofloxacin and Theo-Dur.[2] It is

[2] Opp'n at 7. Dr. Edwards faults Key for failing to obtain quickly FDA approval to add a warning about the Ciprofloxacin interaction, and asserts that Key could have warned the medical community about the Ciprofloxacin interaction sooner than 1989. *Id.* However, Dr. Edwards undisputedly did not know when he treated Plaintiff that Plaintiff had been taking Ciprofloxacin. Tr. at 1295. No warning about the interaction, no matter its content or timing, could have affected Dr. Edwards' treatment of Plaintiff. Moreover, the Theo-Dur package insert and the

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undisputed, however, that Dr. Edwards had no knowledge that Plaintiff had been taking Ciprofloxacin and that, in any event, Dr. Edwards did not look at the warning label.

Similarly, Dr. Edwards' counterstatement of facts dwells extensively on an FDA Notice received by Key relating to Key's claims that Theo-Dur was superior to generic controlled release theophylline products.[3] Although a regulatory action such as the FDA Notice may be relevant to an assessment of Key's conduct, the FDA Notice plainly was not causally related to the injuries claimed. To the extent Key's punishment in this matter is based upon the Ciprofloxacin drug interaction evidence, or upon FDA's concerns with Key's marketing, this case clearly raises the legal issue raised by *State Farm* concerning the reliance of the Oregon courts on unrelated conduct.

Second, the theory of liability below was that Key's nationwide promotion of Theo-Dur had lulled doctors like Dr. Edwards into believing that Theo-Dur was safe and therefore caused them to ignore or fail to consult published warnings. Opp'n at 5-6.[4] Dr. Edwards and the lower courts

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Physician's Desk Reference ("PDR") Supplement included a Ciprofloxacin interaction warning at the time that Dr. Edwards treated Plaintiff. Trial Exs. 308, 318; Tr. 1309-10, 1408, 2486-87. Dr. Edwards did not consult either source. Thus, Key's market conduct concerning the Ciprofloxacin drug interaction clearly is not causally related to the injuries alleged by Plaintiff or Dr. Edwards.

[3] The January, 1989, FDA Notice faulted Key for claiming that Theo-Dur achieved "zero order absorption." Opp'n at 10; Trial Ex. 3. Dr. Edwards fails to note that Key fully satisfied the FDA's concerns simply by modifying its marketing materials to describe Theo-Dur as achieving "*apparent* zero order absorption." Tr. at 3392 (emphasis added). Dr. Edwards cannot plausibly contend that his treatment of Plaintiff was affected by Key's failure to include the adjective "apparent" in its promotional materials.

[4] Key does not challenge here the viability of Dr. Edwards' theory of liability. However, the idea that a treating physician can assert a belief that a prescription drug is "safe," ignores the fact that physicians act as the learned intermediary between the patient and the prescription drug manufacturer, *McEwen v. Ortho Pharmaceutical*

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alike have made it abundantly clear that the punitive damages awarded here are intended to punish and deter this nationwide conduct. Dr. Edwards clearly appealed to the jury to punish Key for all the actual and potential harms caused by or benefits obtained from this marketing campaign, whether or not those injuries arose in Oregon. As in *State Farm*, the question whether punitive damages may be based on extraterritorial conduct and consequences is squarely presented.

Dr. Edwards and Plaintiff persuaded the jury to impose massive punishment upon Key by arguing about the same conduct that is now the focus of Dr. Edwards' Opposition. Even if those facts were properly considered in evaluating the reprehensibility of Key's conduct – an issue that is before this Court in *State Farm* – they should not affect this Court's consideration of this Petition.

II. THE FEDERAL QUESTIONS RAISED IN KEY'S PETITION ARE PROPERLY PRESENTED.

Dr. Edwards argues, without citation to any authority, that none of the issues raised by Key are properly before this Court. He begins with the startling assertion that Key violated Rule 14.1(g). Opp'n at 12. In fact, Key fully complied with that rule in the section of the statement of the case entitled, "B. Presentation of Federal Questions." Pet. at 7-11. As that section demonstrates, Key raised the federal questions both at trial and on appeal, and clearly specified that the source of its objections was the Fourteenth Amendment.

The question of the constitutionality of the amount of the punitive damages award was raised and decided at every stage of this proceeding. As for the constitutionality of the trial procedure, Key argued both at trial and on

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Corp., 528 P.2d 522, 529 (Or. 1974), and that by definition, a prescription drug is safe and effective only when used in accordance with its labeling. 21 C.F.R. 310.303(a) (1977).

appeal that if the court tolerated the trial procedure set up by Plaintiff's and Dr. Edwards' pre-trial agreements, Key's due process rights to a fair trial would be implicated, causing error of constitutional dimension. The fact that no Oregon court chose to address this issue does not mean that the issue was not appropriately raised and preserved.

Certainly, it is essential to this Court's jurisdiction that a substantial federal question has been raised in the underlying state court proceedings. 28 U.S.C. § 1257(a). Meeting the jurisdictional requirements of § 1257(a) "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000). It is sufficient if the record as a whole shows that the federal issue and grounds therefore were brought to the state court's attention. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Presentation of the issue in general rather than in precise terms also is sufficient. *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). Once a federal claim is properly presented, a party is not limited on appeal to the precise arguments made below. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000); *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

Generally, a federal question is deemed to be preserved if it was presented in a manner that satisfies the state rules governing preservation of issues. *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). In Oregon, "[f]or purposes of preserving an alleged error, raising an *issue* at trial ordinarily is essential, identifying a *source* for a claimed position is less so, and making a particular *argument* is least so." *Boytano v. Fritz*, 901 P.2d 835, 838 (Or. 1995), quoting *State v. Hitz*, 766 P.2d 373, 375 (Or. 1998) (emphasis in original); *see also Northwest Natural Gas Co. v. Chase Gardens*, 982 P.2d 1117, 1125 (Or. 1999) (appellate court's refusal to consider alternative causation arguments on appeal was error; "permitting [defendant] to make specific alternative arguments on appeal . . . results in no fundamental unfairness to [plaintiff]. . . . ").

The record clearly establishes both that Key expressly challenged the constitutionality of the punitive damages awarded to Dr. Edwards, and that the Oregon courts decided the issue adversely to Key. Pet. at 7-11; Opp'n at App. A. Dr. Edwards contends, however, that Key was required to raise below each argument supporting its contentions. Opp'n at 12-13.[5] This level of detail is not required. In fact, when this case was tried, this Court had yet to articulate the specifics of federal due process limits on awards of punitive damages. Neither *BMW* nor *Cooper Industries*[6] was yet decided. *BMW* was decided while *Bocci I* was before the Oregon Court of Appeals. In its reply brief below, Key discussed at length the standards and guideposts established in *BMW*, yet the Court of Appeals failed even to mention the case in its opinion. *Bocci v. Key Pharmaceuticals, Inc.*, 974 P.2d 758 (Or. Ct. App. 1999) (en banc) (per curiam) (12a-70a); *See Boytano*, 901 P.2d at 838 (error preserved when issue timely raised; newly available sources or arguments may be considered for first time on appeal).

Dr. Edwards also attempts to stand on the Court of Appeals' conclusion that Key failed to preserve a right to excessiveness review of the punitive damages award to Dr. Edwards. Opp'n at 20-21. As Key pointed out in footnote 10 of its Petition, the appellate court's *ipse dixit* conclusion is flatly contradicted by the record. Both at trial and on appeal, Key expressly challenged the constitutionality of

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[5] Dr. Edwards confuses federal questions with arguments made in support of those questions. Key raised only two federal questions for this Court's review, the first being the unconstitutional excessiveness of the punitive damages award to Dr. Edwards. Key cited three arguments in support of that federal question. To try to give teeth to his preservation argument, Dr. Edwards labels each of those arguments as a separate federal question. The law is clear, however, that a petitioner is not required to raise each argument below, but must only fairly raise the federal question at trial and on appeal. Key met this burden.

[6] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

the punitive damages awarded to Dr. Edwards alone, and Dr. Edwards defended the amount of punitive damages awarded to him, never contending that Key had waived its right to claim that the award was unconstitutionally excessive. The appellate court simply wrongly refused to reach the issue. *See* Pet. at 10 n.10 (citing record). This in itself was constitutional error under the requirements of searching judicial review announced in *BMW* and *Cooper Industries*.

Similarly, Key expressly raised the issue of the unconstitutional impact of the trial procedure. Key argued that a state law trial procedure that allowed this tainted result violated federal due process guarantees. Pet. at 7-10. However, neither the trial nor appellate courts chose to address this issue. The fact that a state court does not address a federal issue does not mean that the issue was not fairly presented below. This Court's requirements are met *either* if the federal issue was raised in the state court *or* if it was considered and resolved by the state court. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Hill v. California*, 401 U.S. 797, 805 (1971). A state court's refusal or failure to articulate its denial of a federal claim is just as reviewable as an express decision on the matter. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973); *Street v. New York*, 394 U.S. 576, 581-85 (1969). Dr. Edwards has raised no other argument opposing *certiorari* with respect to the procedural due process issues raised by the Petition. In short, both of the federal questions raised in Key's Petition are properly before the Court, and warrant review.

III. RESPONDENT DOES NOT SERIOUSLY CHALLENGE THE IMPORTANCE OF THE QUESTIONS PRESENTED.

Aside from using an extended recitation of facts to deflect attention from the Petition's legal issues, Dr. Edwards' Opposition does not seriously dispute the importance of those legal issues. Dr. Edwards instead invites this court to follow the flawed approach taken by the

Oregon courts. The very arguments made by Dr. Edwards against review, however, illustrate the reasons this Court must step in to ensure against deprivation of property without due process of law.

First, Dr. Edwards wrongly contends that no issue of multiple, cumulative punitive damages awards is raised by this case. Opp'n at 17. Yet, Dr. Edwards acknowledges that Key was twice punished by conceding that the state's interest in punishing Key is "identical, whether the harmed party receiving the award is a patient or a physician." Opp'n at 19.[7] Dr. Edwards' assertions do not alter the fact that in this single case Key was punished with multiple, cumulative punitive damages awards, unique circumstances that make this an ideal vehicle through which to address these issues of multiple punishment.

The significance of this issue is highlighted by the *amicus* briefs of the Pharmaceutical Research and Manufacturers of America (PhRMA) and the Product Liability Advisory Counsel, Inc. (PLAC). "Once a defendant has been fully punished for the effects of a given course of conduct, a second award based on the identical effects of the identical course of conduct necessarily exceeds the amount necessary to satisfy society's interest in punishment and deterrence." PhRMA Br. at 4. Repetitive awards "endanger the ability of future claimants to recover even basic compensatory damages," "pose[ ] a significant obstacle to global settlement negotiations . . . and block[ ] the ability of claimants to recover quickly for their injuries." PLAC Br. at 6-9.

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[7] Almost disingenuously, Dr. Edwards contends that the possibility of multiple cumulative damages is solved by the fact that a defendant can present evidence to the jury about other punishments imposed for the same conduct in different cases. Opp'n at 19. This response clearly demonstrates the significance of the issue presented. Here, the multiple, cumulative awards arose before a single jury, so there was no opportunity to present evidence that Key already had been punished.

Second, Dr. Edwards' sole substantive argument is that consideration of the reprehensibility of Key's conduct alone demonstrates a sufficient basis for the punitive damages award to Dr. Edwards. Opp'n at 20-21.[8] Dr. Edwards would have this Court ignore, as did the Oregon courts, the extreme disproportion of the compensatory damages to the punitive damages, and the obvious cumulative nature of the award. For example, Dr. Edwards argues that "nothing in this Court's decisions limits the proportionality review to whether there is a reasonable relationship between Dr. Edwards' punitive damages and his actual damages." Opp'n at 21. Yet *BMW* expressly requires courts to consider exactly the relationship Dr. Edwards eschews.

Dr. Edwards' Opposition also highlights another significant issue – whether the *BMW* guideposts are independent factors to consider in assessing the excessiveness of a punitive damages award. This Court has never addressed this issue, yet it is critical to the application of the *BMW* analysis. Had the Oregon court sought to apply each guidepost during its analysis, then it could not have allowed this staggering award of punitive damages.

Third, Dr. Edwards insists that this case raises no issue regarding the reliance on out-of-state conduct to justify a punitive damages award. As noted above, Dr. Edwards' reliance on Key's nationwide promotional activities and their potential nationwide effects raise just such an issue. *See also* Pet. at 20-22. Nor does Dr. Edwards dispute the significance of this unresolved issue.

Fourth, Dr. Edwards takes the position that Oregon's rational juror test does not conflict with this Court's

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[8] Dr. Edwards tries to explain away the comparative ratio of the award to Plaintiff and the award to Dr. Edwards by mentioning that the jury was limited to the amount of punitive damages demanded in the prayer for relief. As noted in the Petition, that amount is based on evidentiary support. Pet. at 6-7. Thus, the disparity between the two awards cannot be so easily avoided.

teachings in *Cooper Industries, BMW*, and *Oberg*.[9] Yet, as noted in the *amicus* briefs filed by the American Insurance Association (AIA) and the Associated Oregon Industries (AOI), Oregon's "rational juror" standard significantly erodes the searching review mandated by this Court's due process jurisprudence. Oregon's conflation of constitutional principles with state law factors has been repeated in many jurisdictions, diluting the *BMW* guideposts. *See* AIA Br. at 3, 7-11. Moreover, so long as Oregon's "rational juror" approach is permitted to stand, litigants will remain subject to a different standard of constitutional protection depending on where they are sued. *See, e.g.*, AOI Br. at 12-13.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of *Certiorari*.

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[9] Dr. Edwards claims that Key violated Rule 29.4(c) by failing to serve the Oregon Attorney General with its Petition, because Key's Petition allegedly draws into question the constitutionality of OR. REV. STAT. § 18.537(2) (1995). Dr. Edwards is wrong for two reasons. First, that statute was not in effect at the time of the trial, and thus is not implicated. Second, the statute simply codifies the rational juror standard previously articulated by the Oregon courts. That state law standard cannot supplant or override the searching review mandated by federal due process guarantees.